Supreme Court, U.S.
FILED

01 328 AUG 22 2001

No. 01-

OFFICE OF THE CLERK

In the

Supreme Court of the United States

KURT H. EICHORN; WILLIAM J. HUCKINS; T. ROGER KIANG; EDWARD W. LANDIS; ORLANDO NAPOLITANO, individually and on behalf of all others similarly situated; GILBERT G. DALEY; SUSAN H. DIBONA; BETH KING; MICHAEL S. ORATOWSKI; THOMAS L. SALISBURY; LAWRENCE WALSH, individually and on behalf of all others similarly situated,

Petitioners,

v.

AT&T CORP; LUCENT TECHNOLOGIES, INC.;
TEXAS PACIFIC GROUP,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Noel C. Crowley
Crowley & Crowley
Attorneys for Petitioners
20 Park Place, Suite 206
Morristown, NJ 07960
(973) 829-0550

168790

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

127 pp

QUESTIONS PRESENTED

I. Was Section 1 of the Sherman Act violated by an agreement between competing employers to deny employment to a group of non-union employees, where both the purpose and the result of the agreement was to force acceptance of pay cuts brought about by eliminating pensions?

II. Can an agreement not to compete for the services of persons employed by a particular business, made as part of a contract to sell the business, be justified as a lawful ancillary restraint of trade notwithstanding that: (1) the purpose of the agreement was to discourage employee defections in reaction to the new owner's lowering of payroll costs by eliminating pensions; (2) the seller and another party to the agrement, being major customers of products made by the divested business, benefited from lowered production costs achieved through the restraints on employment; and (3) all parties to the agrement were horizontal competitors for the services of the employees and, by reason of the seller's retained operations, remained such after the sale?

III. Was it error to treat the defendant employers' no-hire agreement as a restraint lawfully ancillary to the sale of a business, and not as *per se* unlawful price fixing and group boycotting, even though the make-up of the employer group was not limited to the buyer and the seller of the business, but included other potential employers of the boycotted employees?

IV. Can the doctrine of ancillary restraints justify a non-competition agreement aimed primarily at limiting the economic choices not of the parties to the agreement, but of non-consenting non-parties who derived no benefit from the agreement?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iii

Table of Appendices v

Opinions Below 1

Basis for Jurisdiction 1

Statutory Provision 2

Statement of the Case 2

Reasons for Granting the Writ 8

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 11

Brown v. Pro Football, Inc., 518 U.S. 231 (1996) . 13

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) 9

Cesnick v. Chrysler Corp., 490 F. Supp. 859 (M.D. Tenn. 1980) 14, 15

Coleman v. General Electric Co., 643 F. Supp. 1229 (E.D. Tenn. 1986), *aff'd*, 822 F.2d 59 (6th Cir. 1987) 14, 15

Darius Cole Transp. Co. v. White Star Line, 186 F. 63 (6th Cir. 1911) 16

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 18

FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411 (1990) 8

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 9

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 8, 11, 19

Page

Nynex Corp. v. Discon, Inc., 525 U.S. 128 (1998) . 9

Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) 10

St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978) 12

United States v. Addyston Pipe & Steel, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899) . 16

United States v. Container Corp. of America, 393 U.S. 333 (1969) 8, 9

Statutes:

15 U.S.C. § 1 . . . . i, 2, 8

15 U.S.C. § 26 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1337(a) 2

28 U.S.C. § 2101(c) 1

29 U.S.C. § 1132 2

29 U.S.C. § 1140 . . . . 2, 18

TABLE OF APPENDICES

Page

Appendix A — Opinion And Judgment Of The United States Court Of Appeals For The Third Circuit Dated And Filed April 23, 2001, As Amended June 12, 2001 .... 1a

Appendix B — Memorandum And Order Of The United States District Court For The District Of New Jersey Dated And Entered August 23, 1999, As Corrected December 4, 2000 .... 37a

Appendix C — Memorandum And Order Of The United States District Court For The District Of New Jersey Dated And Entered March 29, 1999 .... 54a

Appendix D — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated May 24, 2001 ... 100a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit in *Eichorn et al. v. AT&T Corp. et al.*, 248 F.3d 131 (3d Cir. 2001), as amended, is set forth in the Appendix hereto (App. 1a-34a).

The Memorandum and Order of the District Court for the District of New Jersey in *Eichorn et al. v. AT&T Corp. et al.*, dated March 29, 1999, is unreported and is set forth in the Appendix hereto (App. 54a-99a).

The Memorandum and Order of the District Court for the District of New Jersey in *Eichorn et al. v. AT&T Corp. et al.*, dated August 23, 1999, is unreported and is set forth in the Appendix hereto (App. 37a-53a).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (App. 35a-36a) affirming the decision of the District Court for the District of New Jersey dated March 29, 1999 was entered on April 23, 2001 (App. 36a). Respective petitions for rehearing were filed by both appellants and appellees were denied by the United States Court of Appeals for the Third Circuit on May 24, 2001 (App. 100a-101a). The opinion was amended on June 12, 2001. This petition for writ of certiorari is filed within ninety (90) days from May 24, 2001, the date rehearing was denied. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provision of 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 1 of the Sherman Act - 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This proceeding originated as two separate actions that were consolidated by order dated November 29, 1996.

The district court had jurisdiction of plaintiffs' antitrust claim under 15 U.S.C. § 26 and 28 U.S.C. § 1337(a) as an action for violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (hereinafter "Section 1"). The district court also had jurisdiction of plaintiffs' claim for violation of Section 510 of the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, under ERISA Section 502, 29 U.S.C. § 1132.

The case was decided in the district court on cross-motions for summary judgment, which in plaintiffs' case sought judgment on the issue of liability only. The district court's initial opinion and order (App. 54a-99a) was rendered on March 29, 1999 and granted defendants' motion to dismiss the plaintiffs' antitrust claim, but denied the motion insofar as it sought dismissal of plaintiffs' claim under ERISA.

Both sides moved for reconsideration, and by opinion and order dated August 23, 1999 (App. 37a-53a), the district court denied plaintiffs' motion for reconsideration but granted defendants' motion for reconsideration and dismissed plaintiffs' claim under ERISA. At the same time the district court denied a motion by plaintiff seeking discovery in support of a motion for class action certification.

Plaintiffs appealed to the Court of Appeals for the Third Circuit, which by decision filed on April 23, 2001 (App. 1a-36a) affirmed the district court's dismissal of the antitrust claim, but reversed the dismissal of the ERISA claim and also reversed the denial of discovery for purposes of seeking class action certification.

Plaintiffs are current and former jobholders of Paradyne Corporation ("Paradyne"), a manufacturer of high-technology network access products which for many years had been a wholly-owned subsidiary of defendant AT&T.

AT&T announced on October 18, 1995 that it was putting Paradyne up for sale, and that Paradyne employees would not be allowed to transfer to other jobs within the AT&T organization.

Within days of that announcement, AT&T announced the start of a process through which it transformed itself into three separate and independent companies. One of them retained the name of AT&T, and the others became known as Lucent Technologies, Inc. ("Lucent"), and NCR Corporation ("NCR"). Ownership of Paradyne was immediately shifted from AT&T to Lucent, and the process of separation between AT&T, Lucent and NCR was completed in a matter of months.

The opinion of the court below refers to the "affiliates" and "former affiliates" of AT&T, and appears to accept the fact that defendants AT&T and NCR were transformed from "affiliate" to "former affiliate" status while the no-hire agreement was still in effect.

The present challenge to the lawfulness of the no-hire agreement should be understood, therefore, as limited to that phase of the no-hire agreement in which the defendants other than AT&T had become entirely separate from AT&T, and could thus be properly referred to only as *former* affiliates of AT&T, and not simply as affiliates.

The earliest phase of the restrictions on job transfers by Paradyne personnel, referred to in prior proceedings as "the Preliminary Net" (App. 3a), was purely inter-organizational.

Paradyne was eventually sold by Lucent to Texas Pacific Group ("TPG"). Negotiations between Lucent and TPG leading to that sale were still in process when a meeting was held between Paradyne's Vice President of Human Resources, Sherril Claus Melio, and consultants hired by TPG to investigate the prospective purchase (App. 4a-5a). Ms. Melio gave TPG's consultants a recommendation she had prepared for reducing Paradyne's costs by eliminating pensions (App. 58a). The consultants agreed that Paradyne could not afford pensions (App. 59a). It was only after those recommendations were made that Thomas Eply, who was TPG's designee to take over the management of the Paradyne business, made the judgment that pensions should be dropped (App. 59a).

A formal contract for the sale of Paradyne from Lucent to TPG for a purchase price of $175 million was executed on June 18, 1996 and included the prohibitions on the hiring of Paradyne personnel which have been referred to in prior proceedings as the "Pre-Closing Net". At this stage of the arrangement, the job lockout was no longer purely inter-organizational, and included TPG as a party. It was also modified to apply only to persons earning in excess of $50,000 per year.

The court of appeals correctly noted that AT&T, Lucent and other AT&T affiliates "wanted to ensure that Paradyne remained a viable entity" because they "purchased many of the network access products Paradyne manufactured" (App. 3a). The court of appeals could accurately have added that commitments for the preservation of these customer-supplier relationships formed a definite part of the contract of sale. The contract was accordingly not a simple divestiture, but was also an arrangement for the outsourcing of production previously accomplished within the AT&T organization.

The parties to the sale transaction were Lucent as seller and five companies affiliated with TPG who collectively made the purchase. The commitment to deny employment to Paradyne employees, however, was made by Lucent not only on its own behalf, but on behalf of AT&T and all AT&T affiliates as well (App. 3a). As the court of appeals correctly noted, it was a commitment that extended into the time period "after the divestiture", meaning the completed spin-off of Lucent and NCR from AT&T (App. 3a).

As the name implies, the "Pre-Closing Net" endured until the closing of the sale. Pursuant to arrangements formalized as part of the closing, the Pre-Closing Net was immediately replaced by the Post-Closing Net. The Post-Closing Net perpetuated the lockout for an additional 245 days, or exactly eight months (App. 4a).

While the Paradyne employees continued to be employed by the same corporate entity (Paradyne), the sale nevertheless marked their separation from the AT&T organization and thus started the running of a six-month period fixed by the terms of the AT&T pension plan for the exercise of their so-called pension "bridging rights" (App. 4a). The bridging rights would have allowed the Paradyne employees to replace the pensions which TPG was unwilling to give them, but only if they had been allowed to replace their jobs at Paradyne with jobs at AT&T or any of the former AT&T affiliates operating under pension plans derivative of the AT&T pension plan (*Id.*). Upon securing such replacement employment, they would have automatically received full credit for their prior Paradyne service for pension-vesting purposes.

In stating that "the no-hire agreement directly impeded the plaintiffs' ability to sell their labor to ***at least*** three companies within the competitive market" (App. 16a) [emphasis added], the court of appeals likely had reference to writings from the Lucent human resources department indicating that an unspecified number of additional companies formerly affiliated with AT&T were also participating in the lockout, with special mention of "Capital Corp." In their efforts to block any escape from the lockout, AT&T and Lucent also caused their outside suppliers of temporary personnel, two of which were mentioned by name, to participate in those efforts. These temporary employment agencies were given the names of individual employees who had voluntarily left Paradyne, and were instructed that such persons should be barred as candidates for even temporary employment at AT&T or Lucent.

Proof that Lucent, AT&T and TPG were ongoing competitors for human services of the type provided by the Paradyne employees both before and after Paradyne was sold came in various forms. Eight of the eleven individual plaintiffs attested by affidavit to active prospects they were pursuing for transferring from Paradyne to Lucent that were halted in obedience to the lockout. Three of the plaintiffs transferred to Lucent after the lockout ended, although without benefit of the special pension rights a more timely transfer would have given them. There is also a memo from a Lucent executive which acknowledges Lucent's own frustrations in observing the lockout, and includes the words, "Paradyne has some outstanding employees who under other circumstances, might be heavily recruited by Lucent."

Plaintiffs' discovery efforts also yielded "handwritten notes of unknown authorship" from defendants' files confirming defendants' awareness that the 245-day Post-Closing Net would destroy the Paradyne employees' bridging rights (App. 88a-90a). The district court agreed that these notes also permit the inference that in the writer's view, "such a result would be desirable because it would ensure that the new Paradyne's employees would have a reduced incentive to attempt leave the new Paradyne right away" (App. 90a).

In concluding that the no-hire agreement was reasonable, the court of appeals did not mention that approximately 140 employees, or 12% of the Paradyne workforce, were terminated almost immediately after TPG assumed control. While the act of termination released these unwanted employees from the operation of the boycott, they were until then barred from seeking alternative employment from the defendant companies for reasons obviously unrelated to Paradyne's business or future plans.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ as it did in the majority of the cases cited below and for the same reason, *i.e.*, to repel incursions against the established rule making horizontal price fixing and group boycotting *per se* violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. As promulgated by this Court, the rule referred to admits of no exceptions or qualifications: "[A]n agreement that interferes with the setting of price by free market forces is illegal on its face." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), quoting *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969). [Internal quotes omitted.]

The rule as thus stated is in no less need of rescue in the case *sub judice* than it was in *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411 (1990), which also involved a price-motivated group boycott in which the contestants were buyers and sellers of personal services. The service providers in that case were lawyers seeking increased compensation for representing indigent criminal defendants. The lower court and certain justices of this Court were fully persuaded by forceful and appealing arguments for suspension of the *per se* rules under the circumstances there presented. Seven justices of this Court disagreed, in effect holding that practical problems of enforcement demanded rigid adherence to the *per se* rule.

The issue this Court is now asked to review is whether the answer should be different simply because the sides in this case are reversed, and it is now the corporate buyers of human services who sought and won suspension of the *per se* rules, and the individual humans who are aggrieved by their non-enforcement.

In the case of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), this Court held that a group boycott organized by retail store owners to force their common suppliers to stop selling to a one-store discount retailer was also a *per se* antitrust violation. In response to the objection that the insignificance of the business precluded proof of injury to competition, this Court made it clear that for pernicious practices classifiable as *per se* violations, such injury is presumed. The holding of the *Klor's* case in this regard was reaffirmed in *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134-135 (1998).

There is a striking contrast between: (1) the indifference of the court of appeals in the present case to a multi-employer effort to deprive employees of their pensions and (2) the hostility which this Court has traditionally exhibited to group-sponsored business practices that even remotely affect free-market pricing of any sort. In the above-cited case of *United States v. Container Corp. of America*, for example, an agreement between horizontal competitors merely to exchange price information was held to have sufficient price-stabilizing influence to be classified a *per se* violation.

In *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), this Court held that an agreement among competitors to discontinue selling on credit "falls squarely within the traditional *per se* rule against price fixing." *Id.* at 648. While some might argue that credit terms and prices are separate matters, very few would argue that pensions are not part of employee compensation.

In *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), this Court overruled a lower court decision that would have excused the formation of a non-competition agreement between two companies which were engaged in the same business, but had not competed for a number of years in the same geographic area. In reversing that decision, this Court held that a *per se* violation was sufficiently proven by the mere formation of the non-competition agreement, followed by proof that prices thereafter went up.

Despite that precedent, the court of appeals in this case allowed companies engaged in active and ongoing competition to suspend that competition within a particular zone or segment of the marketplace, and to maintain the suspension for a period sufficient to extinguish the pension-bridging rights of the affected employees. In *Palmer*, the causal connection between the non-competition agreement and the price rise was merely presumed. In the present case, by way of contrast, the agreement to restrict opportunities for employment was preceded by conferences held by acquiring-company representatives with a representative of Paradyne while it was still controlled by Lucent. The participants in that discussion reached the common conclusion that pensions reduced profitability and should be dropped. Only later did they form the no-hire agreement.

The decision of the court of appeals, holding as it does that the Sherman Act was not violated by a formal written agreement between a group of competing employers to deny employment to Paradyne workers, condones price-fixing, price-motivated group boycotting and a non-competition agreement that destroyed the pension rights of many hundreds of salaried non-union workers. The purpose of the agreement was to defeat efforts being made by those workers to flee from their current employment in reaction to an announcement that their company was being sold, and that the new owner, in order to reduce payroll costs, was discontinuing company pensions. The tactical objective of the boycott was to foreclose the small number of alternative employment opportunities that would have permitted the affected employees to retain their pension rights with full credit for prior service.

In holding that the no-hire agreement was justified under the doctrine of ancillary restraints, the lower court seized on the circumstance that the restraints on competition were connected to the sale of a business. The doctrine referred to, however, has never been recognized as a species of antitrust immunity, but is simply a basis under which particular restraints, provided they qualify for rule of reason analysis, can sometimes be justified, *e.g.*, *National Society of Professional Engineers v. United States*, 435 U.S. at 689. But what the court of appeals failed to recognize is that *per se* violations are by definition offenses for which no justification is allowed, and for which justification if nevertheless presented must be judicially eschewed, *e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 7-8 (1979).

The sale of Paradyne, moreover, was not an ordinary divestiture, but was essentially an outsourcing arrangement under which the purchaser (TPG) agreed as part of the contract to meet Lucent's future requirements for the same Paradyne-made products which Lucent, while it owned

Paradyne, had been obtaining in-house. AT&T, which had owned Paradyne before transferring it to Lucent and had its own requirements for Paradyne-made products, was likewise assured as part of the same contract that it too would continue to receive those products from the same source.

The lower court's dismissive treatment of the no-hire agreement as permissible because ancillary to the sale of a business also disregarded the fact that ownership of Paradyne, and hence the right to sell it, belonged exclusively to Lucent. Lucent enlisted the remaining boycotters, therefore, not because they were needed to accomplish the sale, but because Lucent was not the only employer with a pension plan that would have credited the Paradyne workers with prior service, and thus could not by itself block their access to other equivalent jobs. While it should scarcely count in Lucent's favor that it utilized price fixing to make Paradyne a more saleable business, there is at least in the case of Lucent a plausible connection between the restraint and the sale. For the remaining members of the multi-employer group, however, the price-fixing effort was not ancillary to anything, but was simply a naked restraint of trade. It is also a situation making it appropriate to recall what this Court said in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978):

> The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott.

Id. at 544-545.

It was in the face of this record that the court of appeals, on a motion for summary judgment in which issues of motive and intent were sharply disputed, declared workforce continuity to have been the primary purpose of the no-hire agreement, and loss of pensions only its incidental effect. Intent or the lack of it, however, should not have prevented a finding of illegality based on the actual fixing of prices — in this case prices for human services — through the concerted efforts of employers who competed for those same services. Without benefit of a trial, moreover, there is no way to know if pension elimination was ancillary to the sale of a business, or if it was the sale of the business that was ancillary, and cost reduction in the manufacture of Paradyne products the primary purpose of the transaction.

Despite having reached the wrong conclusion, the court of appeals cited and correctly applied numerous cases indicating that the protection and preservation of competition is as important in the case of companies who compete only as rival employers as it is for competition of all other sorts. The law in that regard was aptly summarized by this Court in *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996), stating that except in situations governed by the antitrust exemption for labor organizations and collective bargaining arrangements, "antitrust law forbids all agreements among competitors **(such as competing employers)** that unreasonably lessen competition among or between them in virtually any respect whatsoever." [Emphasis added.]

Where the court of appeals fell into error, however, was in supposing that ancillary restraints trump price fixing in the hierarchy of antitrust values. The only support the court of appeals claimed to find for that conclusion was limited to two Tennessee federal district court decisions, both of which involved very different facts. One of those cases, *Cesnick v. Chrysler Corp.*, 490 F. Supp. 859 (M.D. Tenn. 1980), runs so thoroughly contrary to the conclusion reached in the present case that it amounts to a virtual brief for the present petitioners. The *Cesnick* court took pains to point out particular factual elements that were missing in that case, but which if present would have compelled a different result.

Cesnick involved the sale by an automobile manufacturer (Chrysler) of its non-automotive air conditioning division (Air-Temp) to Fedders Corporation. With Chrysler removed from the relevant geographic employment market in consequence of the sale, the *Cesnick* Court considered it "entirely conjectural" as to whether the buying and selling companies were competing employers. *Id.* at 866. To this the court in *Cesnick* added, "This court might find a 'direct affront to competition' [citation omitted] had the defendants, for example entered into this agreement for the sole purpose of holding down employment costs." *Id.* at 867. The court further noted the lack of evidence that the no-hire agreement was formed "for the purpose of relieving Fedders of the necessity for 'outbidding' Chrysler for the services of its former employees". *Id.* at 868 n.3. The factual elements referred to as missing in *Cesnick* are exactly the elements on which the present lawsuit has been founded, and which render *Cesnick* valuable only for its reasoning and not for its result.

It should also be noted that both *Cesnick* and the second of the two Tennessee federal decisions, *Coleman v. General Electric Co.*, 643 F. Supp. 1229 (E.D. Tenn. 1986), *aff'd*, 822 F.2d 59 (6th Cir. 1987), are distinguishable from the present case in that in those cases, the restrictions applied by their terms only to employees who effectively consented to the arrangements. In *Cesnick*, the agreement prevented the seller from re-hiring employees of the divested unit only if they rejected jobs offered them by the buyer. In *Coleman*, which involved the sale of a particular unit of the 3M Company to the General Electric Company, the prohibition on rehiring by 3M applied only to employees who voluntarily accepted jobs from General Electric. Such employees, the court noted, were free to choose whether they desired to accept the newly offered jobs. *Id*. at 1243.

The court in *Coleman* also made the same point previously noted in *Cesnick* about lack of ongoing competition between the two employers following the sale. As the court put the matter in *Coleman*, "[N]o competition would have existed for employees in the specialized business of technical ceramics since [seller] ceased doing business in this field". *Id*. In contrast to this lack of post-divestiture competition between buyer and seller in the cases referred to, the record in the present case includes the memorandum of a high-ranking Lucent executive commanding supervisory personnel to strictly observe the no-hire agreement, but in doing so acknowledges, "Paradyne has some outstanding employees who, under other circumstances, might be heavily recruited by Lucent." There are also affidavits from several named plaintiffs attesting to efforts they made to transfer from Paradyne to one of the defendant companies that were cut short by the no-hire agreement.

The long line of decisions holding that horizontal price fixing is never justifiable and always deserving of *per se* condemnation would make this a precedent-shattering case even if it involved no more than the enthronement of the ancillary restraints defense as a ground for utilizing a rule-of-reason instead of a *per se* standard in a horizontal price fixing case. In actuality, the court went considerably further and treated the sale-of-business factor not as a license for evaluating reasonableness, but as a grant of virtual exemption from even the limited antitrust scrutiny which the doctrine of ancillary restraints would normally entail.

Had the doctrine of ancillary restraints been applied consistently with the conventional usage of that term as reflected in cases such as *United States v. Addyston Pipe & Steel*, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899), and *Darius Cole Transp. Co. v. White Star Line*, 186 F. 63 (6th Cir. 1911), it would have been restricted to trade restraints which the parties to a particular transaction place upon themselves, and which typically limit their future ability to compete. In this case, the targeted objects of the curtailment of economic freedom wrought by the restraints were not the parties themselves, but non-consenting non-participants who gained nothing from the transaction, and whose interests were sacrificed so that others could profit at their expense.

The concept of ancillary restraints as ordinarily understood also requires a more rigorous test of reasonableness than anything demanded by the court of appeals. Here the restraints were made facially suspect by their all-inclusiveness, encompassing everyone earning in excess of $50,000 without regard to essentiality of function or ease of replacement. What utterly defeats any pretensions of reasonableness, however, is the knowledge that in anticipation of TPG's takeover of the business, plans had been developed between buyer and seller for terminating approximately 140 of the boycotted employees, amounting to 12% of the work force. The coverage of the no-hire agreement was thus extended to people that TPG didn't even want, and which it dismissed within days of taking control. While for these unwanted workers the boycott restrictions were lifted when the terminations occurred, they were in the meantime restricted in their choice of jobs for reasons not rationally related to the future needs of the business. The object of the boycott, moreover, was not just to retain the remaining 88 percent of the workforce, but to do so at a significant step-down in pay.

The writ should be granted for the additional reason that defendants in this case interfered with the free market deployment of human intelligence and creativity, which is surely the building block for all economic enterprise, and deserving on that account of special antitrust concern. Antitrust enforcement should under the circumstances be particularly vigilant in combating cartel-devised schemes to limit career and vocational choices, or to channel human energies in directions contrary to the free will of the individuals involved.

The court of appeals' description of the defendants' pension plans has also clouded and obscured the basis for representing that the defendants possessed "relational market power" that set them apart from the employers to which other Paradyne employees might have turned. The argument that the boycotting employers represented a distinctive job market with a special appeal for Paradyne workers was based on a common feature of their individual pension plans traceable to their historic origins as former AT&T affiliates. The feature referred to, obviously derivative of the original AT&T pension plan, permitted the employees of one current or former AT&T affiliate, upon gaining employment with another current or former AT&T affiliate, to immediately enroll as vested pension plan participants and continue accruing future pension benefits without serving the vesting period typically required of new employees. It was the boycotting employers' unique capability for immediately replacing the lost Paradyne pensions, therefore, that gave them a special appeal which no other employer could match. The entire point, however, should be rendered academic though correct application of the *per se* rules, which by requiring that injury to competition be presumed eliminates the need for defining the relevant market. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-461 (1986).

Special note should be taken of the contrast between the court of appeals' correct and proper finding that the plaintiff's proofs satisfied all of the precise and demanding requirements for a *prima facie* claim under ERISA Section 510, 29 U.S.C. § 1140, and its refusal to recognize that the same proofs abundantly satisfied the less demanding requirements for price fixing under Sherman. The ERISA claim need not have involved two or more competing employers acting in concert, but here it did. The ERISA claim presupposes that the purpose and intent of eliminating pensions was to reduce payroll costs, which when accomplished through multi-employer collaboration is price fixing by definition. Proof of injury to competition, while unnecessary for ERISA, poses no additional burden under Sherman, since in cases of *per se* violations, it is automatically presumed. The court below correctly concluded that the damages which the plaintiffs sustained were properly classifiable as antitrust damages.

The unwillingness to find a *per se* antitrust violation under these circumstances suggests a basic philosophical disagreement with the traditional perception of price fixing as the consummate marketplace evil, and a determination that even that most pernicious of anticompetitive practices should henceforth be judged by flexible and situational standards. This is not a result easily reconcilable with any of this Court's landmark price fixing and group boycott cases, and is fully deserving of the same characterization this Court gave to an argument advanced in *National Society of Professional Engineers*, *supra*, 435 U.S. at 695, calling it "nothing less than a frontal assault on the basic policy of the Sherman Act."

CONCLUSION

This Court should grant certiorari, reverse the court of appeals, and reaffirm the necessity for preserving the traditional rule.

Respectfully submitted,

NOEL C. CROWLEY
CROWLEY & CROWLEY
Attorneys for Petitioners
20 Park Place, Suite 206
Morristown, NJ 07960
(973) 829-0550

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED APRIL 23, 2001, AS AMENDED JUNE 12, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5791

KURT H. EICHORN; WILLIAM J. HUCKINS; T. ROGER KIANG; EDWARD W. LANDIS; ORLANDO NAPOLITANO, individually and on behalf of all others similarly situated; GILBERT G. DALEY; SUSAN H. DIBONA; BETH KING; MICHAEL S. ORATOWSKI; THOMAS L. SALISBURY; LAWRENCE WALSH, individually and on behalf of all others similarly situated,

Appellants

v.

AT&T CORP; LUCENT TECHNOLOGIES, INC.;
TEXAS PACIFIC GROUP

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action Nos. 96-cv-03587 & 96-cv-04674
(Honorable Mary Little Cooper)

Argued December 12, 2000

Before: SCIRICA and AMBRO, *Circuit Judges*, and
POLLAK, *District Judge*[*]

(Filed April 23, 2001)

* * *

OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

In this appeal from the grant of summary judgment we must decide whether defendants AT&T Corp., NCR Corp., Lucent Technologies, and Texas Pacific Group's agreement to restrict the hiring of certain employees upon Lucent's sale of Paradyne Corp. was a violation of § 1 of the Sherman Antitrust Act. We also must decide whether this no-hire agreement which effectively cancelled the plaintiff employees' AT&T pension bridging rights violated § 510 of the Employee Retirement Income Security Act. We hold the no-hire agreement was a valid covenant not to compete that was reasonable in scope and therefore not a violation of § 1 of the Sherman Act. But also we hold plaintiffs have presented sufficient prima facie evidence of AT&T and Lucent's specific intent to interfere with an ERISA funded employee pension fund to survive summary judgment on the ERISA § 510 claim.

---

[*] The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

I.

In July 1995, AT&T, a long distance telephone and wireless services provider, decided to sell one of its affiliates, Paradyne Corp., a manufacturer of network access products for the telecommunications industry. Contemplating the sale, AT&T wanted to ensure that Paradyne remained a viable entity because AT&T and its other affiliates, including Lucent Technologies, purchased many of the network access products Paradyne manufactured. To make Paradyne more attractive to buyers as an ongoing business, AT&T adopted a human resource plan that placed restrictions on Paradyne employees' ability to transfer to other divisions of AT&T ("the Preliminary Net"). Specifically, the Preliminary Net precluded an employee who voluntarily left Paradyne from being hired by any other division of AT&T. The premise for the hiring bar was AT&T's belief that one of Paradyne's most marketable assets-was its skilled employees. The retention of Paradyne's employees, therefore, was considered essential for the sale of Paradyne.

Shortly after adopting the Preliminary Net, AT&T consummated a business reorganization plan resulting in three independent companies: AT&T, Lucent Technologies, and NCR Corp. (the "trivestiture"). As part of the trivestiture, AT&T transferred ownership of Paradyne to Lucent. Consistent with the Preliminary Net, the Paradyne employees, now employed by Lucent, were precluded from seeking re-employment at any other AT&T division or affiliate after the trivestiture.

On July 31, 1996, Lucent sold Paradyne to Texas Pacific Group. Before closing, Lucent agreed, on behalf of itself and the other former AT&T affiliates, that it would not hire, rehire, retain, or solicit the services of any Paradyne employee or consultant whose annual income exceeded $50,000. This "Pre Closing Net" was consistent with the understanding that Texas Pacific Group's interest in purchasing Paradyne was based on its desire to acquire the technical skills of Paradyne's employees for a sufficient period of time to ensure a successful transition of ownership.

Once the deal was closed, Lucent and Texas Pacific Group entered a post-closing agreement ("Post Closing Net") in which Lucent warranted on behalf of itself and the other AT&T affiliates that for 245 days (8 months) following the sale and the expiration of the Pre Closing Net, it would not seek to hire, solicit or rehire any Paradyne employee or consultant whose compensation exceeded $50,000. The eight month no-hire agreement had the practical effect of cancelling the Paradyne employees' accrued pension benefits under their former AT&T pension plans. Under the AT&T pension plan, employees were entitled to "bridging rights" which allowed them to retain their level of accrued pension benefits if they left AT&T and returned within six months. After six months, the bridging rights expired. Employees rehired after the six month period would need five years of employment to regain their previous pension levels. Because the Post Closing Net barred Paradyne employees from returning to an AT&T affiliate for eight months, these employees automatically lost the bridging rights they had acquired under their AT&T pensions.

Before the sale was consummated, Texas Pacific Group hired an outside consultant to determine the benefit package it could offer the Paradyne employees. Paradyne's Vice President of Human Resources, Sherril Claus Melio, who had previously held the same position when Paradyne was owned by AT&T and Lucent, assisted the consultant in drafting various benefit plan proposals. The consultant concluded that in order to make Paradyne financially competitive, Texas Pacific Group could not offer the same pension package AT&T had previously offered its employees. Although Melio's exact role in Texas Pacific Group's decision is disputed, Texas Pacific Group ultimately decided not to offer a defined pension benefits program to its new employees.

The plaintiffs are former Paradyne employees who allege the Preliminary Net, as well as the Pre and Post Closing Nets, collectively represent an unlawful group boycott in violation of § 1 of the Sherman Act. Additionally, they contend the defendants conspired to eliminate their pension benefits thereby engaging in an illegal price fixing scheme in violation of § 1 of the Sherman Act. Furthermore, they allege the no-hire agreement, which effectively cancelled Paradyne employees' bridging rights under their AT&T pensions, violated § 510 of the Employee Retirement Income Security Act.

In addressing these claims, the District Court held that plaintiffs failed to prove a violation of § 1 of the Sherman Act and failed to produce sufficient prima facie evidence of AT&T and Lucent's specific intent to interfere with an ERISA funded pension plan to support their § 510 claim. The court, therefore, granted defendants' motion for summary judgment. After the grant of summary judgment, plaintiffs filed a discovery motion in connection with an anticipated motion for class certification which the District Court denied. This appeal followed.

II.

The District Court had jurisdiction under 15 U.S.C. § 26 and 29 U.S.C. § 1140 because plaintiffs' claims allege violations of § 1 of the Sherman Antitrust Act and § 510 of ERISA. We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the District Court's grant of summary judgment on plaintiffs' antitrust and ERISA claims. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993). We exercise plenary review over the District Court's legal determinations concerning class certification and review its factual findings for abuse of discretion. *Bogus v. Am. Speech & Hearing Ass'n*, 582 F.2d 277, 289 (3d Cir. 1978).

III.

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1 (1994).

Under § 1, unreasonable restraints on trade are prohibited because they inhibit competition within the market.

Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993). In order to assert a cause of action under § 1, plaintiffs must prove they have suffered an antitrust injury that is causally related to the defendants' allegedly illegal anti-competitive activity. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Once there is the finding of antitrust injury, courts examine the alleged illegal conduct under one of two distinct tests: per se violation or rule of reason. Under the per se test, "agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality" are found to be antitrust violations. *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 692 (1978). For those activities not within the per se invalidity category, courts employ the rule of reason test. Under this test, plaintiffs have the burden of establishing that, under all the circumstances, "the challenged acts are unreasonably restrictive of competitive conditions" in the relevant market. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 28 (1911). "An analysis of the reasonableness of particular restraints includes the consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972).

A.

We hold the AT&T Preliminary Net was not a violation of § 1 of the Sherman Act. The District Court found that "as of . . . the date that the Preliminary Net was put into effect

. . . , Lucent was a wholly-owned subsidiary of AT&T, and accordingly, the two companies were a singular entity that could not conspire to violate the Antitrust laws." *Eichorn v. AT&T Corp.*, CA No. 96-3587, slip op. at *17 (D.N.J. September 10, 1999). In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Supreme Court held the coordinated acts of a parent and its wholly owned subsidiary cannot themselves give rise to § 1 antitrust violations. The Court reasoned, "[a] parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." *Id.* at 771. Because the Preliminary Net was an internal restriction between a single corporation, AT&T, and its wholly owned subsidiaries, Lucent and NCR, and not an agreement between separate corporate identities, it was not a violation of § 1 of the Sherman Act. *Id.* at 769 ("An internal agreement to implement a single unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police."). Although plaintiffs assert AT&T and Lucent were not motivated by a single "corporate consciousness" because they were in the process of becoming separate entities, we believe that during the effective time period of the AT&T Preliminary Net, AT&T and Lucent retained a unified corporate interest for the purpose of antitrust analysis. It was not until AT&T divested all of its stock in Lucent and after the lapse of the Preliminary Net that the two companies became completely separate entities.

As Supreme Court and our precedent make clear, only anti-competitive actions between competitors give rise to

Sherman Act liability. *Copperweld*, 467 U.S. at 771; *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125, 1132 (3d Cir. 1995) ("The operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor."); *Weiss v. York Hosp.*, 745 F.2d 786, 813 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985). As a single entity in a parent subsidiary relationship, the defendants in this case were incapable of conspiring to violate the antitrust laws through the Preliminary Net agreement. *Siegel*, 54 F.3d at 1132.

We next turn to plaintiffs' claim that the Pre and Post-Closing Nets, collectively referred to as the no-hire agreement, represent an illegal group boycott and a horizontal price fixing conspiracy under § 1 of the Sherman Act. Plaintiffs allege Lucent, AT&T and Texas Pacific Group horizontally competed for the plaintiff employees' technical skills and services. As competitors, they argue, the defendants conspired to suspend competition for plaintiffs' technical services with the purpose and the effect of locking them out of the labor market. *See Anderson v. Shipowners' Ass'n of the Pac. Coast*, 272 U.S. 359 (1926) (agreement between most shipowners on Pacific coast to deny employment to any seaman who did not register with association was violation of § 1 of Sherman Act); *Law v. Nat'l Collegiate Athletic Assoc.*, 134 F.3d 1010 (10th Cir.) (NCAA rule limiting salary of basketball coaches was per se violation of § 1 of Sherman Act), *cert. denied*, 525 U.S. 822 (1998). By locking them out and effectively cancelling their entitlement to AT&T pension rights, plaintiffs argue the defendants conspired to fix the cost of labor in the market. In support, plaintiffs cite several Supreme Court cases that hold horizontal group boycotts and price fixing conspiracies are per se violations of the Sherman Antitrust Act. *See FTC v. Super. Ct. Trial Lawyers Assoc.*, 493 U.S. 411, 422 (1990); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344-45 (1982); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 7-8 (1979).

But the facts here are substantially different from the classic per se horizontal price fixing and group boycott conspiracies the Court has generally found to be per se antitrust violations. *Broad. Music, Inc.*, 441 U.S. at 8 ("Easy labels [like price fixing] do not always supply ready answers."). Because of the fact specific inquiry required to assess antitrust liability under the Sherman Act, we will address each prong of the § 1 analysis.

B.

Private plaintiffs pursuing claims under § 1 of the Sherman Act have standing when they suffer an antitrust injury that is causally related to the defendants' allegedly illegal anti-competitive activity. *Brunswick*, 429 U.S. at 489. The Supreme Court has described antitrust injury as injury of

> the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation. It should, in short, be

> the type of loss that the claimed violations . . . would be likely to cause.

Id. (internal quotes omitted).

It is well established that an antitrust injury reflects an activity's anti-competitive effect on the competitive market. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) ("The antitrust injury requirement . . . ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.") (emphasis in original). We have consistently held an individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market. *See, e.g.*, *City of Pittsburgh v. West Penn Power Comp.*, 147 F.3d 256, 266-67 (3d Cir. 1998) (holding action that did not lessen competition in a "marketplace" was not antitrust injury); *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 182 (3d Cir. 1997) (the determination of whether a party has suffered an antitrust injury "depends on how the market is defined"); *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869 (3d Cir. 1995). While a plaintiff may have individually suffered an injury as a result of defendants' actions, the antitrust laws were designed to protect market-wide anticompetitive activities. *Atlantic Richfield*, 495 U.S. at 338 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1902) ("The antitrust laws were enacted for the protection of *competition*, not *competitors*.") (emphasis in original)); *see also Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n.*, 884 F.2d 504, 508 (9th Cir. 1989) (holding plaintiffs must "plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors").

In dismissing plaintiffs' antitrust claims the District Court stated,

> Plaintiffs apparently argue that the injury to competition is that they are prevented from providing their services to AT&T, Lucent or its affiliates. Put simply, the antitrust laws are not concerned with injury to competitors (here the plaintiffs), but with injury to competition. That these plaintiffs are prevented from working at AT&T, Lucent or their affiliates for the limited time period during which the pre-closing and post-closing nets were in effect is not an injury to competition. In our view, plaintiffs' allegations of economic injury to themselves misperceive the nature of the injury which is required to be established in order to sustain a claim under Section 1 of the Sherman Act.

Eichorn, CA No. 96-3587, slip op. at *20-21 (internal citations omitted).

While employees who are precluded from selling their labor have not necessarily suffered an antitrust injury, "employees may challenge antitrust violations that are premised on restraining the employment market." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 377a (rev. ed. 1995) (footnotes omitted); *see also* Brian R. Henry, *'Sorry, We Can't Hire You . . . We Promised Not To':*

The Antitrust Implications of Entering Into No-Hire Agreements, 11-Fall Antitrust 39 (1996) ("Most courts considering the issue have held that employees suffer 'injury' recognized by the antitrust laws when their employment opportunities are restricted by a no-hire agreement between potential employers, and thus have standing to sue the entity imposing such a provision."). As a leading treatise on antitrust states:

> Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services. It would be perverse indeed to hold that the very object of the law's solicitude and the persons most directly concerned-perhaps the only persons concerned-could not challenge the restraint.
>
> * * *
>
> An employee overcomes the primary hurdle to standing when he shows that the alleged violation restrains competition in the labor market. Of course, he must still show injury-in-fact that was proximately caused by the violation and, in damage cases, that can be quantified without undue speculation.

Areeda & Hovenkamp, *supra*, at ¶ 377c (footnotes omitted).

In *Anderson*, the Supreme Court held that a seaman, on behalf of himself and other members of the seamen's union, could sue an association of most of the shipowners in the region when the shipowners' association adopted unduly strict regulations governing employment. 272 U.S. at 359. The Court found the shipowners' agreement violated the antitrust laws because the regulations prevented the "free exercise of the rights" of the seamen to engage in trade and commerce. *Id.* at 363 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). Because unregistered seamen were precluded from working on any association ship, which constituted the majority of the ships in the region, they suffered an injury protected under the antitrust laws.

While *Anderson* was decided many years before the Supreme Court detailed the antitrust injury requirement in *Brunswick*,[1] several courts since *Brunswick* have found that no-hire agreements which preclude employees from seeking employment from a third party employer can give rise to antitrust injury. In *Cesnick v. Chrysler Corp.*, 490 F. Supp. 859 (M.D. Tenn. 1980), plaintiffs who were precluded from seeking re-employment at Chrysler when their division was sold to a third party suffered an antitrust injury. The Court reasoned that it "must conclude that the market for employee skills is a market subject to the provisions of the Sherman Act." *Id.* at 864.

---

[1] Several other courts prior to *Brunswick* held that employees barred from seeking employment from a third party employer because of a no- hire agreement have standing to litigate a § 1 claim. *See, e.g.*, *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957) (coach precluded from working in National Football League because of agreement among all of the teams in the league had standing); *Quinonez v. Nat'l Assoc. of Secs. Dealers, Inc.*, 540 F.2d 824 (5th Cir. 1976) (plaintiff who was fired by securities dealer and was unable to find employment with another securities dealer because of agreement among dealer firms not to hire an employee who was discharged by another fir m suffered sufficient injury to proceed with antitrust claim); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir.) ("There can be little doubt that an employee who is deprived of a work opportunity has been injured . . . because the selling of one's labor is a commercial interest."), *reh'g denied*,

(Cont'd)

More recently in *Roman v. Cessna Aircraft Co.*, 55 F.3d 542 (10th Cir. 1995), the Court of Appeals for the Tenth Circuit held that a plaintiff precluded from seeking employment as an airplane engineer with the Cessna Aircraft Company because of an agreement between Cessna and the Boeing Company not to hire each other's engineers suffered an antitrust injury. The Court reasoned that plaintiff

> alleged that competition in the market for his services as an employee had been directly impeded by defendants' agreement not to compete for each other's employees. He further alleges that he was injured by that agreement because it prevented him from selling his services to the highest bidder. . . . We believe this is sufficient to allege antitrust standing.

(Cont'd)
540 F.2d 1085 (5th Cir. 1976); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967) (plaintiff prohibited from seeking employment at competing employer because of agreement between employers in industry nct to hire each other's employees suffered injury sufficient to bring antitrust claim).

Id. at 545; *see also Law*, 134 F.3d 1010 (coach whose opportunities in employment market were impaired by agreement among members of NCAA to limit the maximum compensation paid to coaches suffered antitrust injury).

In a similar manner, plaintiffs here allege they have been precluded from selling their services to three companies within the industry, NCR, AT&T and Lucent, and that the no-hire agreement interfered with their ability to attain pension benefits. Because the no-hire agreement directly impeded plaintiffs' ability to sell their labor to at least three companies within the competitive market and effectively cancelled their AT&T pension benefits, we believe they have standing to litigate their § 1 claims. *Roman*, 55 F.3d at 545. To the extent the District Court held that plaintiffs did not suffer an antitrust injury and lacked standing to litigate their § 1 claims, it was in error.

C.

Plaintiffs contend on appeal that the no-hire agreement was a group boycott and a horizontal price fixing conspiracy. *See Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). As direct competitors for their labor, plaintiffs argue, the defendants entered the no-hire agreement as part of a concerted effort to lock them out of employment and decrease labor costs by eliminating pension benefits. *See Nat'l Soc'y of Prof. Eng'rs*, 435 U.S. at 692 (quoting *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969) ("[A]n agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face.")). Plaintiffs maintain that group boycotts and horizontal price fixing schemes between competitors are per se violations of the antitrust laws because these agreements are manifestly uncompetitive and are "naked restraints of trade . . . [that have] no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *see also N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 19-20 (1958). In support, they cite *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 (1984), where the Supreme Court stated,

> Horizontal price fixing . . . [is] ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that these practices are anti-competitive is so high. . . . In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.

While plaintiffs contend the no-hire agreement was per se illegal because it was a horizontal group boycott and a price fixing conspiracy, we can find no support within the relevant case law for this label. *Broad. Music, Inc.*, 441 U.S. at 8 ("Easy labels do not always supply ready answers."). The per se illegality rule applies only in those cases where the business practice in question is one, which on its face, has "no purpose except stifling of competition." *White Motor Co.*, 372 U.S. at 263; *see also N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985) (per se rule confined to limited types of anti-competitive practices); *Larry Muko, Inc. v. S.W. Pa. Bldg. and Const. Trades Council*, 670 F.2d 421, 429 (3d Cir.) ("Generally the application of the per se rule has been limited to those 'classic' boycotts in which a group of business competitors seek to benefit economically by excluding other competitors from the marketplace."), *cert. denied*, 459 U.S. 916 (1982). The Supreme Court has been cautious in extending the per se approach to claims that fall outside certain previously enumerated categories of liability. *See, e.g.*, *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 100 n.21 ("Judicial inexperience with a particular arrangement counsels against extending the reach of the per se rules."); *Broad. Music, Inc.*, 441 U.S. at 20 n.33 ("The per se rule is not employed until after considerable experience with the type of challenged restraint."); *Maricopa County Med. Soc'y*, 457 U.S. at 344 ("Experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it."). Because of the fact specific inquiry involved in antitrust analysis, the Supreme Court has recognized that claims not within established categories of antitrust liability are more appropriately analyzed under the rule of reason where courts can balance the effect of the alleged anti-competitive activity against its competitive purposes within the relevant product and geographic markets.

Acknowledging this judicial hesitance to extend the per se rule to new categories of antitrust claims, we note there are no Supreme Court cases nor any federal cases that have applied the per se rule in similar factual circumstances. The only two federal cases that have analyzed similar group boycott and price fixing claims have held that no-hire agreements executed upon the sale of a corporation are analyzed under the rule of reason. *Coleman v. Gen. Elec. Co.*, 643 F. Supp. 1229, 1243 (E.D. Tenn. 1986), *aff'd*, 822 F.2d 59 (6th Cir. 1987); *Cesnick*, 490 F. Supp. at 866-67.

In *Coleman*, the 3M Corporation sold its ceramics division to General Electric. 643 F. Supp. at 1243. After closing, 3M and General Electric entered an agreement in which 3M warranted that it would not rehire any employee who voluntarily accepted a job with General Electric. Several ceramic division employees brought suit alleging a group boycott that was per se invalid under § 1 of the Sherman Act. Disagreeing, the court reasoned that "courts have refused to apply the 'group boycott' designation where the effect is not to drive out competition but to achieve some other goal, whether or not the goal withstands the rule of reason analysis." *Id.* (citing *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1177-78 (D.C. Cir. 1979)). Because the agreement only precluded the plaintiffs from selling their services to one corporation, the court held it only had a "de minimus impact on the employment market in general," and the per se rule was "wholly inapplicable." *Id.*

Similarly in *Cesnick*, former employees of Chrysler's Non Automotive Air Conditioning Division sued under § 1 when Chrysler sold the division to the Fedders Corporation and agreed not to rehire its employees. 490 F. Supp. at 866. Although plaintiffs characterized the agreement as a group boycott and a per se violation of § 1, the court stated, "[i]n the absence of any Supreme Court cases based on facts similar to those of this case, this Court will not accept the proposition that any conduct that can be characterized as a group boycott is a per se violation." *Id.* The court reasoned the Chrysler-Fedders'

> agreement was designed to increase the likelihood that Fedders would enjoy the services of the

> experienced AirTemp employees, an obviously sound business purpose. To the extent that the agreement effectively restrained competition between Chrysler and Fedders for employee services, a competition whose existence is entirely conjectural, that effect was incidental as well as de minimus.

Id. at 866-67.

Cognizant that there are no Supreme Court cases holding no-hire agreements entered upon the legitimate sale of a business to a third party are per se antitrust violations,[2] and recognizing that the only two federal courts that have addressed the issue have declined to apply the per se rule, we hold the no-hire agreement here is more appropriately analyzed under the rule of reason. As several courts have recognized, the per se rules of illegality are the exception to antitrust analysis and are only employed in certain recognized categories. *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1506 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990).

The District Court properly characterized the no-hire agreement as a common law covenant not to compete.

---

[2] Similarly, we can find no cases in which a no-hire agreement entered into upon the sale of a business to a third party that resulted in the loss of employee benefits was found to be a horizontal price fixing conspiracy. *See Broad. Music, Inc.*, 441 U.S. at 9-10 (quoting *Topco Assocs., Inc.*, 405 U.S. at 607-08 ("It is only after considerable experience with certain business relationships that courts classify them as per se violations.")).

As we discuss, courts have uniformly found that covenants not to compete should be examined under the rule of reason. *See, e.g.*, *McDonald v. Johnson & Johnson*, 722 F.2d 1370 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984); *Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553 (11th Cir. 1983); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982). Therefore, we will analyze plaintiffs' claims under the rule of reason so we can examine the effect of the defendants' agreement within the wider context of its competitive purposes and its impact on the relevant product and geographic markets.

D.

Under the rule of reason, we look at the totality of the circumstances surrounding an alleged anti-competitive activity, including facts peculiar to the relevant business, to determine the "nature or purpose" of the allegedly illegal restraint. *Topco Assocs., Inc.*, 405 U.S. at 607. "The finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed and the restraint's history, nature and effect." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (citing *Maricopa*, 457 U.S. at 342). In applying this test, we examine the competitive significance of the alleged restraint to determine whether it has an anti-competitive effect on the market and is an unreasonable restraint on trade. *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991), *cert. denied*, 505 U.S. 1221 (1992). In this regard, covenants not to compete executed upon the sale of a business to a third party are generally not recognized as antitrust violations. *See Bus. Elecs. Corp.*, 485 U.S. at 730 n.4 ("The classic ancillary restraint is an agreement by the seller of a business not to compete within the market."); *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 689; *Lektro-Vend Corp.*, 660 F.2d at 265 ("The recognized benefits of reasonably enforced noncompetition covenants are now beyond question."). As early as 1899, courts have recognized that covenants not to compete are not violations of § 1 of the Sherman Act because,

> It [i]s of importance, as an incentive to industry and honest dealing in trade, that, after a man ha[s] built up a business with extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell.

United States v. Addyston Pipe & Steel, 85 F. 271, 280 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

In this vein, courts have characterized covenants not to compete executed upon the legitimate transfer of ownership of a business as ancillary restraints on trade. *Id.*; *see also Bus. Elecs. Corp.*, 485 U.S. at 730 n.4; *United States v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976) ("Covenants not to compete executed in conjunction with the purchase of a business allow the purchaser to obtain the value of the good will for which he has paid."), *cert. denied*, 429 U.S. 1122 (1977). So long as these covenants are reasonable in scope, there is no antitrust violation under the rule of reason. *See, e.g., Syntex Labs., Inc., v. Norwich Pharmacal Co.*, 315 F. Supp. 45, 56 (S.D.N.Y. 1970) ("[I]t is hornbook law that a covenant not to compete ancillary to the sale of a business (or part of a business), when reasonably limited to time and territory, does not fall within the prohibitions of the Sherman Act."), *aff'd*, 437 F.2d 566 (2d Cir. 1971).

The District Court found,

> In our view, the pre-closing and post-closing nets at issue here are a subset of common law covenants not to compete. Moreover, it is clear that the no-hire agreements imposed restrictions which were "ancillary to legitimate transactions," and thus properly considered an ancillary restraint.

Eichorn, CA No. 96-3587, slip op. at *23 (internal citation omitted).

We agree that the no-hire agreement was not an unreasonable restraint of trade under § 1 of the Sherman Act. *Frackowiak v. Farmers Ins. Co., Inc.*, 411 F. Supp. 1309, 1318 (D. Kan. 1976) ("Numerous Courts have recognized the general rule that agreements not to compete, entered into in conjunction with the termination of employment or sale of a business, do no offend the federal antitrust provisions if they are reasonable in duration and geographical limitation."). The primary purpose of the no-hire agreement was to ensure that Texas Pacific Group, as the purchaser of Paradyne, could retain the skilled services of Paradyne's employees. Although the no-hire agreement precluded the employees from seeking employment at an AT&T affiliate for 245 days, the primary purpose of the agreement was not anti-competitive. Contrary to plaintiffs' assertions, we can find no evidence to support their claim that the no-hire agreement was executed for the improper purpose of restraining trade and the cost of labor in the telecommunications industry. The primary purpose of the no-hire agreement was to ensure the successful sale of Paradyne to Texas Pacific Group which required workforce continuity.[3] Any restraint on plaintiffs' ability to seek employment at AT&T and any effect on their pension bridging rights was incidental to the effective sale of Paradyne.

Because the no-hire agreement was a legitimate ancillary restraint on trade, we must determine whether the eight month restriction from employment at an AT&T affiliate was reasonable or whether it went further than necessary to ensure the successful transition of ownership. *Cesnick*, 490 F. Supp. at 868 (quoting *Syntex Labs.*, 315 F. Supp. at 56) ("The question in every case [involving a covenant not to compete ancillary to the sale of a business] is whether the restraint is reasonably calculated to protect the legitimate interests of the purchaser in what he has purchased, or whether it goes so far beyond what is necessary as to provide a basis for the inference that its real purpose is the fostering of monopoly.").

---

[3] Plaintiffs contend the true motive of the no-hire agreement was not work force continuity but eliminating pension benefits to reduce Texas Pacific Group's costs. They argue that if work force continuity were really the motive, Texas Pacific Group could have offered enhanced benefits packages to entice the work force to remain with Paradyne rather then simply agreeing to cancel their AT&T pension benefits. But the existence of alternative means to achieve a legitimate business goal does not in itself mean the defendants' chosen course of action was uncompetitive and improper.

We do not think the eight month restriction on re-employment at an AT&T affiliate was unreasonably broad. It is reasonable to believe Texas Pacific Group would require the technical skills of these employees for at least this eight month period, if not longer, to ensure a successful transition of ownership from Lucent. Furthermore, the no-hire agreement only precluded the plaintiffs from working at Lucent or an AT&T affiliate. The employees were free to leave Texas Pacific Group and seek employment elsewhere within the telecommunications industry. Significantly, there is no evidence in the record to support plaintiffs' claim that AT&T was the only employer in the market to whom they could sell their services. As the District Court found, there are over twenty other telecommunications firms that compete for plaintiffs' technical services. Furthermore, the market for plaintiffs with more generalized educational and work backgrounds includes "a vast number of jobs" nationwide. *Eichorn*, CA No. 96-3587, slip op. at *27-28 n.17.

Therefore, we hold the no-hire agreement was not an unreasonable restraint on trade. As an ancillary covenant not to compete, the no-hire agreement was reasonable in its restrictions on the plaintiffs' ability to seek employment elsewhere. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 689. While the no-hire agreement essentially barred the plaintiffs' ability to retain their desirable AT&T pension benefits, § 1 of the Sherman Antitrust Act is not the appropriate vehicle here for redress. In formulating their claim in antitrust parlance, plaintiffs have argued their inability to work at their former jobs was a manifestly uncompetitive restraint on trade within the relevant market. We disagree. In order to advance their antitrust claim, plaintiffs are forced to define narrowly the relevant market affected by the defendants' activity as,

> potential employers within a 35 mile radius of Holmdel/Middletown with the capacity and capability of employing or utilizing large numbers of persons with specialized experience in high speed data communications equipment of the sort Paradyne develops and makes . . . who can provide continuity of the pension benefits which have accrued to [plaintiffs] under the AT&T and/or Lucent pension plans.

Eichorn, CA No. 96-3587, slip op. at *29-30 n.18.

We believe this narrow market definition is inappropriate. As we recently stated, "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir.) (quoting *Brown Shoe Co.*, 370 U.S. at 325), *reh'g denied*, 129 F.3d 724 (1997), *cert. denied*, 523 U.S. 1059, (1998). "The test for a relevant market is not commodities [in this case technical jobs] reasonably interchangeable by a particular plaintiff, but 'commodities [technical employees] reasonably interchangeable by consumers [technology companies] for the same purposes.' " *Id.* at 438 (quoting *United States v. E.I. duPont Nemours and Co.*, 351 U.S. 377, 395 (1956)). Additionally, we have said "the relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Pa. Dental Assn. v. Med. Serv. Assn. of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); *see also Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 515 (3d Cir. 1998). This geographic market must "conform to commercial reality." *Acme Mkts., Inc. v. Wharton Hardware & Supply Corp.*, 890 F. Supp. 1230, 1239 (D.N.J. 1995) (citing *Brown Shoe Co.*, 370 U.S. at 336).

By defining the market so narrowly that it only includes the defendants, plaintiffs' proffered geographic and product markets are unrealistic.[4] The market for the plaintiffs' labor is much broader. We agree with the District Court that the relevant market is not limited to AT&T and its affiliates but rather includes all those technology companies and network services providers who actively compete for employees with the skills and training possessed by plaintiffs.[5]

---

[4] Plaintiffs argue they are under no obligation to define the relevant product and geographic markets because the defendants' conduct per se violated the antitrust laws. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984). Because we find this case is governed under the rule of reason, plaintiffs necessarily have the affirmative burden of proving the relevant product and geographic markets affected by the defendants' alleged uncompetitive activity. *Ideal Dairy Farms, Inc. v. John LaBatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996) (holding plaintiffs must present evidence from which rational person could conclude the relevant markets are actually what plaintiffs allege them to be).

Because market realities reflect that the no-hire agreement did not have a significant anti-competitive effect on the plaintiffs' ability to seek employment within this broader telecommunications market nor that it fixed the cost of labor in the industry, we conclude it was not an antitrust violation under the rule of reason.[6] The antitrust laws were not designed to protect every uncompetitive activity, but rather only those activities that have anti-competitive effects on the market as a whole. *Broad. Music, Inc.*, 441 U.S. at 23 ("Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints."). While plaintiffs' loss of their pension benefits gives us pause, we believe they can seek redress through other statutes more adequately suited to their injury than § 1 of the Sherman Antitrust Act.[7] *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1042 (2d Cir. 1985) ("To the extent that the . . . [plaintiff's antitrust claim] is based on diminished retirement benefits, it is essentially an ERISA matter."), *cert. denied*, 475 U.S. 1012 (1986).

---

[5] As previously noted, the District Court found there are over twenty companies that compete for employees with plaintiffs' technical skills. Additionally there are a "vast number of jobs" nationwide for plaintiffs with more generalized work and educational experience. *Eichorn*, CA No. 96-3587, slip op. at *27-28 n.17.

[6] Plaintiffs also attempt to characterize defendants' activity as an illegal exercise of relational market power. *See* Sullivan & Grimes, *The Law of Antitrust*: *An Integrated Handbook* § 2.4e2iv (2000); Warren S. Grimes, *Market Definition in Antitrust Claims*: *Relational Market Power and the Franchisor's Conflict of Interest*, 67 Antitrust L.J. 243 (1999). They contend AT&T offered a unique pension benefits program that essentially locked the plaintiffs into working for them. *See Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992). Claiming that AT&T was the only telecommunications company within the industry that offered such an extensive benefits program, plaintiffs maintain they were prevented from seeking employment at any other company, since to do so would result in the loss of valuable pension benefits. According to this argument, the no-hire agreement that precluded plaintiffs from working at an AT&T affiliate prevented them from working at the only company within the industry where they could receive these unique benefits. *See, e.g.*, *Aspen Skiing Co. v. Aspen Highlands*

(Cont'd)

IV.

We now turn to whether the no-hire agreement, which effectively cancelled plaintiffs' AT&T pension

---

(Cont'd)
Skiing Corp., 472 U.S. 585 (1985); *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968). Central to plaintiffs' argument is the contention that the AT&T pension benefits are unique in the industry. We see no evidence for this in the record. Therefore, we need not address whether to extend the relational market power analysis to the facts of this case.

[7] Although the no-hire agreement effectively cancelled the plaintiffs' AT&T benefits, these plaintiffs were free to seek employment elsewhere in the industry where pension benefits may have been available. But even though defendants' activity was not a price fixing conspiracy under the Sherman Act, it may give rise to liability under § 510 of ERISA where a different analysis is involved.

bridging rights, violated § 510 of ERISA. Section 510 of ERISA provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the employee benefit plan . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

29 U.S.C. § 1140 (1994).

Congress enacted § 510 "primarily to prevent unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension benefits." *DeWitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 522 (3d Cir. 1997). We have held an employer violates § 510 when it acts with the specific intent to interfere with an employee's right to benefits. *DiFederico v. Rolm Co.*, 201 F.3d 200, 204-05 (3d Cir. 2000). To prove a prima facie case under § 510 a plaintiff must show (1) that an employer took specific actions (2) for the purpose of interfering (3) with an employee's attainment of pension benefit rights. *Gavalik v. Cont'l Can Co.*, 812 F.2d 834, 852 (3d. Cir.), *cert. denied*, 484 U.S. 979 (1987). We held in *DiFederico* that once a plaintiff makes a prima facie showing, the employer has the burden of articulating a legitimate non-discriminatory reason for his conduct. Then, the burden shifts back to the plaintiff to show that the employer's rationale was pre-textual and that the cancellation of benefits was the "determinative influence" on the employer's actions. *DiFederico*, 201 F.3d at 205.

The crucial threshold issue in this case is whether defendants AT&T and Lucent[8] had the specific intent to interfere with the Paradyne employees' pension benefit rights or whether the cancellation of the bridging rights was merely an incidental by-product of the sale of Paradyne. *DeWitt*, 106 F.3d at 523 ("[E]mployee must show that the employer made a conscious decision to interfere with the employee's attainment of pension eligibility or additional benefits."). Plaintiffs allege the no-hire agreement and its eight month restriction on re-employment was enacted for "the direct and immediate objective and with the singular purpose of eliminating the Paradyne pensions." In support of their claim, plaintiffs argue the eight month restriction on re-employment is suspiciously close to the six month vesting period of the AT&T pension plan and that this temporal proximity provides circumstantial evidence that the cancellation of the benefits was a motivating factor in the timing of the no-hire agreement. Additionally, they point to the role of Paradyne's Vice-President of Human Resources in proposing Texas Pacific Group's ultimate pension package for the Paradyne employees. Plaintiffs also cite a confidential memorandum between Larry Knoch and Linda Roussau of Lucent Technologies, which acknowledges the eight month restriction in the no-hire agreement had the practical effect of cancelling the Paradyne employees' pension rights. Finally, plaintiffs point to the economic benefits that both Lucent and AT&T received from the no-hire agreement, specifically that neither defendant was required to pay for pension benefits, as evidence of specific intent to interfere with an ERISA pension plan in violation of § 510. *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 348 (3d Cir. 1990) (savings to an employer that result from employees' termination might be viewed as a motivating factor sufficient to satisfy the intent element of § 510 liability).

---

[8] In their complaint plaintiffs did not allege that Texas Pacific Group violated § 510 of ERISA. App. at 92a, 157a ("Plaintiffs demand judgment . . . declaring the refusal of AT&T and Lucent to employ members of the Class until after the expiration of their pension bridging rights to be in violation of ERISA section 510, 29 U.S.C. § 1140.").

Although the District Court found this evidence insufficient to support a finding of specific intent to interfere with the plaintiffs' benefit plans,[9] *Eichorn*, CA No. 96-3587, slip op. at *9-12, we believe at this stage of the proceedings plaintiffs have presented sufficient circumstantial evidence of intent to interfere with their pension rights to create a genuine issue of material fact.[10] *Turner*, 901 F.2d at 347 ("Employee may show [a violation of § 510] . . . by circumstantial evidence."). As we held in *DeWitt*, "[i]n most cases, . . . 'smoking gun' evidence of specific intent to discriminate does not exist. As a result, the evidentiary burden in these cases may also be satisfied by the introduction of circumstantial evidence." 106 F.3d at 523 (quoting *Gavalik*, 812 F.2d at 851). Of course we express no opinion whether plaintiffs will prevail at trial under the preponderance of evidence standard for § 510 claims. *DiFederico*, 201 F.3d at 205 ("[If] employer carries its burden, the plaintiff then must persuade the court by a preponderance of the evidence that the employer's legitimate reason is pre-textual."). Because plaintiffs have submitted sufficient prima facie evidence to withstand defendant's motion for summary judgment, we will reverse and remand for further proceedings.

---

[9] In its initial order granting summary judgment on the antitrust claims, the District Court found plaintiffs produced enough evidence to survive a motion for summary judgment on the ERISA claim. Upon reconsideration, the District Court reversed its position stating it improperly relied on circumstantial evidence that the defendants experienced an overall economic gain from the no-hire agreement and sale of Paradyne. In re-examining the relevant case law, the court said the proper inquiry should focus on the reduction in actual benefit expenses caused by the termination of employees, rather than a broader assessment of the overall financial impact of termination on the employer's business. *See Clark v. Coats & Clark*, 990 F.2d 1217, 1224 (11th Cir. 1993) ("[M]easures designed to reduce costs in general that also result in an incidental reduction in benefits expenses do not suggest discriminatory intent."). We agree with the Eleventh Circuit. But we hold that plaintiffs have produced sufficient evidence that both AT&T and Lucent received a direct and substantial financial gain from the cancellation of pension benefits, namely they were relieved from paying large sums for the pension benefits of the several Paradyne employees affected by the agreement.

V.

Plaintiffs contend the District Court erred when it denied their motion for additional discovery for a contemplated motion for class certification on their ERISA § 510 claim. In denying plaintiffs' motion the District Court stated, "[W]e do not find that . . . Third Circuit[ ] . . . [precedent] requires this Court to keep this matter open so that plaintiffs may engage in discovery and motion practice on the issue of class certification when the underlying claims have been dismissed with prejudice." *Eichorn*, CA No. 96-3887, slip op. at *18. Because we hold plaintiffs have submitted sufficient prima facie evidence to support their ERISA § 510 claim, we believe they may be entitled to additional discovery to pursue a possible motion for class certification. Accordingly, we direct the District Court on remand to address plaintiffs' motion for additional discovery and any future motion for class certification under the requirements of Fed. R. Civ. P. 23(c).

---

[10] We believe a genuine issue of material fact exists only with the Pre and Post-Closing Nets' effect on the Paradyne employees' pension rights. Because the Preliminary Net did not prohibit plaintiffs from receiving their pension benefits as employees of Lucent Technologies, it did not violate § 510 of ERISA.

VI.

For these reasons, we will affirm the District Court's dismissal of plaintiffs' antitrust claims. We will reverse the grant of summary judgment on plaintiffs' ERISA § 510 claims. We will also reverse the Court's order denying plaintiffs' motion for additional discovery for an anticipated class certification motion and, on remand, direct the District Court to address this issue in accordance with the requirements of Fed. R. Civ. P. 23(c).

A True Copy:
Teste:

Clerk of the United States Court of
Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5791

KURT H. EICHORN; WILLIAM J. HUCKINS; T. ROGER KIANG; EDWARD W. LANDIS; ORLANDO NAPOLITANO, individually and on behalf of all others similarly situated; GILBERT G. DALEY; SUSAN H. DIBONA; BETH KING; MICHAEL S. ORATOWSKI; THOMAS L. SALISBURY; LAWRENCE WALSH, individually and on behalf of all others similarly situated,

Appellants

v.

AT&T CORP; LUCENT TECHNOLOGIES, INC.;
TEXAS PACIFIC GROUP

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action Nos. 96-cv-03587 & 96-cv-04674
(Honorable Mary Little Cooper)

Argued December 12, 2000
Before: SCIRICA and AMBRO, *Circuit Judges*, and
POLLAK, *District Judge**

---

* The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on December 12, 2000. On consideration whereof, it is now hereby

ORDERED AND ADJUDGED by this Court that the order of the District Court entered March 29, 1999, dismissing plaintiffs' antitrust claims, be, and the same is hereby affirmed. It is further

ORDERED AND ADJUDGED by this Court that the order of the District Court entered August 23, 1999, granting defendants' motion for summary judgment on the ERISA claims and denying plaintiffs' motion for additional discovery in contemplation of class certification, be, and the, same is hereby reversed and the case remanded for further proceedings consistent with this opinion. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

DATED: April 23, 2001

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND ENTERED AUGUST 23, 1999, AS CORRECTED DECEMBER 4, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 96-3587 (MLC)
(consolidated)

KURT H. EICHORN, WILLIAM J. HUCKINS, T. ROGER KIANG, EDWARD W. LANDIS, ORLANDO NAPOLITANO, GILBERT DALEY, SUSAN H. DIBONA, BETH KING, MICHAEL S. ORATOWSKI, THOMAS L. SALISBURY, and LAWRENCE WALSH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

AT&T CORP., LUCENT TECHNOLOGIES, INC., and TEXAS PACIFIC GROUP,

Defendants.

MEMORANDUM AND ORDER

COOPER, District Judge

This matter comes before the Court on the cross-motions for reconsideration of this Court's March 29, 1999 Memorandum and Order. For the reasons stated, plaintiffs' motion for reconsideration is denied, and defendants AT&T and Lucent Technologies Inc.'s motion for reconsideration is granted. Pursuant to the Court's discussion herein, the Court hereby vacates its March 29, 1999 Memorandum and Order to the extent that it denied AT&T and Lucent's motion for summary judgment on plaintiffs' ERISA § 510 claim, 29 U.S.C. § 1140, and enters summary judgment in defendants' favor on that claim. Our dismissal of plaintiffs' § 510 claim in the manner set forth today, coupled with our denial of plaintiffs' motion for reconsideration, renders this case closed in this Court.

BACKGROUND

In the interest of brevity, and in light of our recognition that the parties are familiar with the facts surrounding the institution of this lawsuit, the Court will not repeat the extensive factual background provided in our prior Memorandum and Order. However, a brief recitation of the procedural history of this case will put the present motion in proper context. This matter originally came before the Court on the parties' cross-motions for summary judgment. The Court heard oral argument on the matter and rendered a 47-page Memorandum and Order dated March 29, 1999. Our prior opinion: (1) granted defendant Texas Pacific Group's ("TPG") motion for summary judgment with respect to plaintiffs' antitrust claim asserted against TPG;[1] (2) granted AT&T and Lucent's motion for summary judgment also on plaintiffs' antitrust claims asserted against those defendants, but denied their motion with respect to plaintiffs' claim under § 510 of ERISA; and (3) dismissed as moot plaintiffs' motion for partial summary judgment on the antitrust claim.

---

[1] The Court found that it appeared that the only claim against TPG was the antitrust claim. Thus, our decision to grant TPG's motion for summary judgment dismissed that entity from the lawsuit with prejudice.

Plaintiffs seek reconsideration of this Court's dismissal of the antitrust claim against all defendants. Plaintiffs argue that a recent Supreme Court case, rendered after oral argument on these motions, is dispositive of their claim that defendants' conduct amounted to a "group boycott" in violation of § 1 of the Sherman Antitrust Act. Defendants oppose the motion, arguing that the intervening case does not in fact make new law; instead it merely restates general principles which this Court has already considered in connection with the cross-motions for summary judgment. Accordingly, defendants assert that plaintiffs' notion for reargument presents nothing more than mere disagreement with the Court's prior findings concerning the viability of plaintiffs' § 1 claims.

Defendants AT&T and Lucent seek partial reconsideration of this Court's March 29, 1999 Memorandum and Order on that aspect which denied defendants' motion for summary judgment on plaintiffs' ERISA § 510 claim. Defendants argue that reconsideration is appropriate for three principal reasons. First, defendants contest the Court's reliance upon the general economic benefit which inured to AT&T and Lucent as a result of the sale of Paradyne to TPG. Defendants argue that the case law which states that an inference of improper motive may be gained from evidence of economic gain as a result of employer conduct has focused narrowly upon the inference which can be drawn from the fact that the employer realized economic gain *in connection with its benefits costs*. Thus, according to defendants, proof of overall economic gain, such as that which arguably inured to AT&T and Lucent in connection with its sale of Paradyne, is of no evidentiary significance under the relevant case law.

Defendants also argue, in relation to their first point, that the Court erred in finding that there was any evidence that defendants AT&T and Lucent engaged in the sale of Paradyne with the specific intent to interfere with plaintiffs' ERISA-protected rights. Finally, defendants maintain that the Court erred in not considering this claim to be premised upon a refusal to rehire. Under the relevant case law, an employer's refusal to rehire a former employee does not state a violation of ERISA § 510.

DISCUSSION

Motions for reconsideration in this District are governed by Local Rule 7.1(g):

> A motion for reargument shall be served and filed within 10 days after the entry of the order or judgment on the original motion by the Judge or Magistrate. There shall be served with the notice a brief setting forth concisely the matters or controlling decisions which counsel believes the Judge or Magistrate has overlooked.

Local Rule 7.1(g). It is well settled that a motion for reconsideration is "an extremely limited procedural vehicle." *Resorts Int'l, Inc. v. Greater Bay Hotel and Casino, Inc.*, 830 F. Supp. 826, 831 (D.N.J. 1992). Motions for reconsideration will not be granted where the only apparent purpose for filing such a motion is to assert the reasons why the moving party disagrees with the district court's decision. *See Hatco Corp. v. W.R. Grace & Co.*, 849 F. Supp. 987, 990 (D.N.J. 1994) (quotations omitted); *see Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F. Supp. 159, 163 (D.N.J. 1988). Further, Rule 7.1(g) does not "contemplate a Court looking to matters which were not originally presented, but which have since been provided for consideration." *Florham Park Chevron*, 680 F. Supp. at 162 (citation omitted).

A. Plaintiffs' Motion for Reconsideration.

Plaintiffs argue that the Supreme Court's opinion in *NYNEX Corp. v. DISCON Inc.*, __ U.S. __, 119 S. Ct. 493 (1998) requires the Court to reconsider its prior dismissal of plaintiffs' Sherman Act § 1 claim. Apparently recognizing that the Court dismissed plaintiffs' § 1 claim relying upon several alternative reasons, plaintiffs maintain that "the clarification afforded by *NYNEX* should logically lead to reconsideration of all the corollary conclusions that derived from what *NYNEX* now identifies as a false premise." (Pls.' Br. in Supp. at 5; Pls.' Reply Br. at 3.)

The Supreme Court in *NYNEX* explained the nature of the question before it as follows:

> The specific legal question before us is whether an antitrust court considering an agreement by a buyer to purchase goods or services from one supplier rather than another should (after examining the buyer's reasons or justifications) apply the *per se* rule if it finds no legitimate

> business reason for that purchasing decision. We conclude no boycott-related *per se* rule applies and that the plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself.

NYNEX, __ U.S. __, 119 S. Ct. at 498. Plaintiffs argue that "[i]n *NYNEX* the Supreme Court *both explored and reaffirmed its earlier precedents* confirming that when a horizontal group boycott is shown to exist, injury to the competitive process is to be inferred from the very nature of the agreement, making it immaterial that only a single entity may have been harmed." (Pls.' Br. in Supp. at 2 (emphasis added).) Plaintiffs thus concede that the *NYNEX* decision does not represent "an intervening change in the controlling law" which is the requisite basis for granting a motion for reargument. *See Barclays Bank P.C. v. 865 Centennial Ave. Assoc. Ltd. Partnership*, 26 F. Supp. 2d 712, 722 (D.N.J. 1998). Instead, it is clear that plaintiffs' argument proffers reasons why they disagree with the Court's conclusion that the instant facts do not give rise to a group boycott which would then be subject to a *per se* antitrust analysis. (*See* Mem. & Order at 19 n.14 ("Plaintiffs' protestations notwithstanding, it is clear that this case must be governed by a rule of reason analysis rather than simply labeling defendants' conduct as a group boycott and thus subjecting the pre-closing and post-closing nets to *per se* treatment under the antitrust laws.").)

The Court has already considered those arguments, as they were presented both in the written submissions and at oral argument on the cross-motions for summary judgment.

(*See, e.g.*, Pls.' Br. in Supp. of Mot. for Partial Summ. J. at 25-33; Pls.' Br. In Opp'n to Defs.' Mot. for Summ. J. at 7-13.) It is well established that "a party seeking reconsideration must show more than disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." *G-69 v. Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990).

The Court finds that plaintiffs have not demonstrated that reconsideration of our dismissal of the antitrust claim is warranted against all defendants. The Court will deny plaintiffs' motion for reargument.

B. Defendants' Motion for Reconsideration

Defendants argue, *inter alia*, that reconsideration is appropriate for the following reasons: (1) no inference of discrimination can be gleaned from evidence that AT&T and Lucent recognized overall positive economic gains from the sale of Paradyne to TPG, and (2) because there is no other evidence of defendants' specific intent to interfere with plaintiffs' pension bridging rights under ERISA, plaintiffs have provided no evidence to refute defendants' articulated legitimate business reason for agreeing to the 245 day post-closing net at the behest of TPG, the buyer of Paradyne. Defendants point out that the reason that these arguments were not raised in their original motion papers is because plaintiffs provided no argument on the merits of their ERISA § 510 claim, and thus there was no reason for defendants to brief these specific issues. (Defs.' Br. in Supp.)

The Court agrees with defendants' two primary contentions in support of reconsideration. Specifically, this Court relied upon cases in which the courts determined that an inference of improper motive may be drawn where the evidence demonstrates that the employer's action resulted in an economic gain in connection with the employer's benefit costs. Here, however, the Court focused upon the overall economic benefit which inured to AT&T and Lucent as a result of the sale of Paradyne to TPG rather than focusing on the narrower question of whether the evidence in the record established that the sale of Paradyne produced reduced benefit costs to AT&T and Lucent.

In concluding that evidence of overall economic gain could conceivably support an inference of discrimination, and thus present a factual issue sufficient to survive summary judgment, the Court relied upon *Feret v. First Union Corp.*, 1999 WL 803374 (E.D. Pa. 1999). There the court considered as evidence of discriminatory intent the entire projected savings generated by the decision to outsource the employer's Information Technology Group. There is no discussion in the opinion explaining why the court focused on the total economic impact of the proposed outsourcing instead of confining its analysis to the benefits-related costs.

Upon further consideration of the Third Circuit opinions upon which the *Feret* court relied for its conclusions in that regard, we agree with defendants' position that the district court in *Feret* improperly found that an inference of discrimination may be drawn based upon overall economic gain rather than economic advantages relating to the reduction in pension costs. Consequently, our reliance upon

Feret was misplaced, thus warranting reconsideration of our prior ruling. In *Turner v. Schering Plough Corp.*, 901 F.2d 335, 348 (3d Cir. 1990), the Third Circuit recognized that savings to the employer that result from an employee's termination might be viewed as a motivating factor, thus establishing the intent to interfere required for a § 510 claim. The court noted that there was no evidence in the record about the economic consequences of the plaintiff's termination, but stated that it did "not rule out the possibility that an employee with a vested pension can establish a prima facie case by *showing a pension reduction of such size* that it might reasonably be considered to have motivated the discharge." 901 F.2d at 348 n.7. Similarly in *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 523 (3d Cir. 1997), the Third Circuit applied the same analysis in finding that pension plan "savings" created by the plaintiff's termination were not of sufficient size to be viewed as a motivating factor for the employer's actions.

We agree with defendants' position that in determining the evidentiary value of such evidence of an employer's economic gains as a result of the adverse employment decision, the relevant focus is on the reduction in benefits expenses, not any assessment of overall financial impact. *See Clark v. Coates & Clark*, 990 F.2d 1217, 1224 (11th Cir. 1993) ("[M]easures designed to reduce costs in general that also result in an incidental reduction in benefits expenses do not suggest discriminatory intent."); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 239 (4th Cir. 1991) (granting summary judgment to the employer on a § 510 claim where the employee's only proof was that the employer terminated him in order to realize financial savings;

plaintiff's proof was held to be insufficient without any evidence that savings in pension costs played a role); *Muller v. Hotsy Corp.*, 917 F. Supp. 1389, 1420 (N.D. Iowa 1996) ("A [§ 510] plaintiff must prove that his discharge resulted in a substantial savings to a defendant in terms of benefit expenses.").

Absent reliance upon the overall economic gains which inured to AT&T and Lucent's benefit due to the sale of Paradyne to TPG, plaintiffs have provided no direct or circumstantial evidence which demonstrates that defendants' reason for agreeing to the 245 post-closing net was a pretext for the real reason, which was AT&T and Lucent's specific intent to interfere with plaintiffs' pension bridging rights under the AT&T pension plan. Defendants correctly point out that plaintiffs cannot rely upon the fact that AT&T and Lucent agreed to the 245 day post-closing net in order to ensure that the sale of Paradyne to TPG would be consummated as evidence of AT&T and Lucent's improper motive. The undisputed evidence reflects that it was TPG, not AT&T or Lucent, that "required the implementation of a post-sale no hire agreement." According to Thomas Arnold,

> TPG informed us that they wanted to preserve and maintain Paradyne's human resource skill base to ensure that, after its sale, Paradyne could avoid significant disruptions to its operations and position itself for a successful future by continuing to produce quality products with the same degree of reliability, thereby successfully serving its existing customers and acquiring new customers.

(Arnold Aff. ¶ 15 (submitted in Defs.' Exs. in Supp. of Mot. for Summ. J.).) Indeed, this evidence shows that AT&T and Lucent's sole motivation in agreeing to the post-closing net was to ensure the consummation of the sale of Paradyne to TPG. To the extent that there is evidence in the record which could arguably support the contention that TPG was concerned about pension costs of its newly acquired Paradyne employees, that evidence cannot be considered in connection with determining AT&T and Lucent's intent in entering into the agreement with TPG.

At bottom, we agree with defendants' assertion that its articulated reason for agreeing to the 245 day post-closing net, namely to effectuate the sale of Paradyne to TPG, cannot be assailed under § 510 of ERISA. *See McNab v. General Motors Corp.*, 987 F. Supp. 1115 (S.D. Ind. 1997), *aff'd*, 162 F.3d 959 (7th Cir. 1998). The evidence in the summary judgment record presented to the Court upon the original cross-motions for summary judgment demonstrates that this case presents the classic example of circumstances in which the loss of benefits to plaintiffs is a consequence of, not a motivating factor behind, AT&T and Lucent's action. *See Dewitt*, 106 F.3d at 5221-23.

We must address one final point with respect to defendants' motion for reconsideration. Anticipating plaintiffs' next litigation position, we note that the Court has considered whether additional discovery on plaintiffs' § 510 claim should be permitted prior to dismissing it outright. In this connection, plaintiffs' original opposition papers to the motion for summary judgment on this claim included an argument that the motion should be denied because plaintiffs needed additional time for discovery relating to their § 510 claim. The Court considered and rejected this argument, finding that plaintiffs' counsel had ample time under the Court's scheduling order to conduct the necessary discovery in connection with this claim. (Mem. & Order at 35-36.)

Our decision to dismiss plaintiffs' § 510 claim based upon the summary judgment record as it presently stands is in recognition of our previous rejection of plaintiffs' request for additional time for discovery. We see no basis for reconsideration of that ruling, and the Court need not reiterate what we have already said on that point. We only add at this juncture that plaintiffs' request for discovery concerning the authorship of certain notes which indicate that the author was aware of the potential effect that the Paradyne sale would have had on employee bridging rights, even if ascertained, would not save this claim from dismissal. The Court finds that this evidence, standing alone, cannot support an inference of AT&T and Lucent's specific intent to interfere with plaintiffs' bridging rights. At best, the notes signify an awareness of the potential effect of the sale on those rights. However, because we have ruled out the possibility of an inference of improper motive based upon AT&T and Lucent's overall economic gain and their business reasons for agreeing to the 245 day post-closing net proposed by TPG, the inference which plaintiffs seek to draw from these notes cannot save the day. Accordingly, the Court finds that there is no need to defer entering judgment as a matter of law at this stage, given the record and our prior ruling denying plaintiffs' request for additional discovery. (Mem. & Order at 36.)

C. The Parties' Belated Requests for Court Intervention on Discovery Issues Relating to Motion for Class Certification

The final point which we must address is an issue raised by the parties by letters to this Court in June 1999 in connection with discovery related to a motion for class certification contemplated by plaintiffs. Specifically, after the Court's disposition of the summary judgment motions, the parties filed the instant motions for reconsideration. Shortly thereafter, the parties attended a pretrial conference before Judge Wolfson to determine an expedited schedule for discovery related to the motion for class certification which plaintiffs intended to file. After receiving plaintiffs' motion, defendants requested a conference with Judge Wolfson, as it appeared from plaintiffs' moving papers that plaintiffs sought to certify a class not only on the ERISA claim (which was still pending at that point), but also on the antitrust claim dismissed on March 29, 1999.

Judge Wolfson instructed the parties to address their concerns about the scope of potential class certification discovery to this Court, and suggested that the appropriate context for resolution of that issue would be in addressing the instant cross-motions for reconsideration. After learning that the parties sought to address this issue in this context, the Court directed counsel to place their arguments as to why resolution of these issues in connection with the instant motions for reconsideration was appropriate.

The Court has reviewed the parties' positions concerning (1) why the Court should address the issue at this point, and (2) the merits of plaintiffs' position that discovery on the dismissed claims in anticipation of plaintiffs' motion for class certification is appropriate. (*See* Pls.' Ltr. dated 6-15-99; Pls.' Supp. Ltr. dated 6-17-99; Defs. AT&T & Lucent's Ltr. dated 6-16-99; Def. TPG's Ltr. Br. dated 6-15-99.)

Plaintiffs rely on the following authority as a basis for their position that this Court should allow discovery related to the dismissed antitrust claims in anticipation of their motion for class certification: (1) Federal Rules of Civil Procedure 54 and 23.1; (2) the basic principle, found in case law, which states that the merits of a case have no bearing on class certification issues; and (3) *Finberg v. Sullivan*, 634 F.2d 50, 64 (3d Cir. 1980). (*See* Pls.' Ltr. dated 6-15-99; Pls.' Supp. Ltr. dated 6-17-99.) Plaintiffs argue that certification of the class on the antitrust claims is appropriate despite dismissal because "certification of both the dismissed and surviving claims is necessary to obviate any uncertainty that the claims of the unnamed class members will not be time-barred before the order of dismissal can be reviewed on appeal." (Pls.' Ltr. dated 6-15-99.) Plaintiffs further advise that "[t]he alternative is an avalanche of separate lawsuits, timed to avoid the expiration of the statute of limitations, filed by individual members of the classes described in [the Complaints] who are not named as representative plaintiffs." Moreover, plaintiffs maintain that "any putative antitrust claimants who fall outside of what the court considers to be a properly defined class should in fairness have timely notice of the need for individual lawsuits to preserve their claims." (*Id.*)

Defendants counter that the procedural history of this case and the manner in which this litigation has progressed should preclude plaintiffs' request for class certification on a claim dismissed with prejudice. (AT&T & Lucent's Ltr.

dated 6-16-99.) Specifically, they note that Judge Wolfson determined over two years ago at the initial scheduling conference that class certification discovery would be suspended and that the parties should limit discovery to those issues essential to preparing dispositive motions. (*See* Order dated 12-9-96.) Defendants maintain that "plaintiffs' attempt to now certify the dismissed claims vitiates all of the careful planning that went into the dispositive motion procedure — a procedure that was agreed to by the Court and all parties." (AT&T and Lucent's Ltr. dated 6-15-99 at 3; TPG's Ltr. dated 6-16-99 at 5-6.) Moreover, defendants argue that certification of the dismissed claim is inappropriate because absent class members will be prejudiced if the dismissed antitrust claim is certified, as they will be bound to an adverse judgment under *res judicata* principles. They also argue that to certify a class on the dismissed claim would be " 'promot[ing] inefficiency for its own sake.' " (AT&T and Lucent's Ltr. dated 6-16-99 at 4 (citing *Marx v. Centrum Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984).)

The Court has considered the parties' positions. It appears that all parties request that this Court consider the issue of the need for additional discovery in anticipation of a class certification motion in the context of deciding this motion. Based upon the Court's disposition of defendants' motion for reconsideration which found dismissal of the plaintiffs' ERISA claim appropriate, and in light of parties' consent, we will consider the issue at this juncture.

Turning to the merits of plaintiffs' application for additional discovery and class certification on the dismissed antitrust claim (and now the ERISA § 510 claim), we find defendants' position on this point persuasive. Plaintiffs' arguments notwithstanding, we do not find that the Third Circuit's decision in *Finberg* requires this Court to keep this matter open so that plaintiffs may engage in discovery and motion practice on the issue of class certification when the underlying claims have been dismissed with prejudice. We find this especially true in light of the fact that plaintiffs agreed to an approach to discovery in this case which is contrary to plaintiffs' current request.

The court in *Finberg* was faced with a different factual scenario than this case presents. The plaintiffs in *Finberg* filed a motion for class certification which was pending in the district court for nine months prior to the court's decision on defendants' motion for summary judgment. The district court granted defendants' motion and dismissed plaintiffs' class certification motion as moot. The Third Circuit stated that the district court's decision to hold the motion for class certification in abeyance until deciding the summary judgment motion was erroneous, given the factual circumstances of the case and the nature of plaintiffs' substantive claims. Because there was a potential that the claim of the named plaintiff for declaratory and injunctive relief would become moot, the court stated that the district court's rulings on the substantive claims did not constitute a valid basis for denial of the plaintiff's class certification motion. *Finberg*, 634 F.2d at 64.

Finberg simply does not squarely address the issues raised by plaintiffs here. Moreover, inasmuch as *Finberg* is instructive as to whether a district court's dismissal of a claim on the merits obviates any need to address class certification issues, there is no pending motion for class certification in this case (albeit the fact that it appears that briefing on the motion was in progress at the time this issue was raised). *See Kirchgessner v. Wilentz*, 884 F. Supp. 901, 918 (D.N.J. 1995).

We also note that the other authorities cited by plaintiffs in support of their position that discovery and class certification on the dismissed claims is appropriate are inapposite. Finally, we express our agreement with defendants' argument that certifying a class after dismissal would be inappropriate because such action by this Court would subject members of that determined class to the consequences of *res judicata* should our dismissal be upheld on appeal. For each of these reasons, we deny plaintiffs' application for additional discovery and class certification at this stage of the case.

IT IS THEREFORE on this 19th day of August, 1999 **ORDERED** that plaintiffs' motion for reconsideration be and hereby is **DENIED**, and defendants' motion for reconsideration be and hereby is **GRANTED**. The Court hereby **VACATES** its prior Memorandum and Order dated March 29, 1999 to the extent that it denied defendant AT&T and Lucent's motion for summary judgment on plaintiffs' ERISA § 510 claim. Pursuant to the Court's Memorandum issued today, summary judgment on plaintiffs' § 510 claim in favor of defendants AT&T and Lucent be and hereby is **GRANTED**, and that claim is hereby **DISMISSED WITH PREJUDICE** against AT&T and Lucent. Plaintiffs' request for discovery related to a contemplated motion for class certification is hereby **DENIED**.

s/ Mary L. Cooper
MARY L. COOPER
United States District Judge

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND ENTERED MARCH 29, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 96-3587 (MLC)
(consolidated)

KURT H. EICHORN, WILLIAM J. HUCKINS, T. ROGER KIANG, EDWARD W. LANDIS, ORLANDO NAPOLITANO, GILBERT DALEY, SUSAN H. DIBONA, BETH KING, MICHAEL S. ORATOWSKI, THOMAS L. SALISBURY, and LAWRENCE WALSH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

AT&T CORP., LUCENT TECHNOLOGIES, INC., and TEXAS PACIFIC GROUP,

Defendants.

MEMORANDUM AND ORDER

COOPER, District Judge

This matter comes before the Court on the following motions: (1) by defendant Texas Pacific Group, Inc. ("TPG") for summary judgment seeking dismissal of plaintiffs'

Complaints in their entirety; (2) by defendants AT&T Corporation ("AT&T") and Lucent Technologies, Inc. ("Lucent") for summary judgment seeking dismissal of plaintiffs' Complaints in their entirety; and (3) plaintiffs' motion for partial summary judgment on the issue of defendants' liability pursuant to Section 1 of the Sherman Antitrust Act. For the reasons expressed below, the motion by AT&T and Lucent is granted in part and denied in part, and the motion by TPG is granted. Plaintiffs' cross-motion for partial summary judgment as to defendants' liability under § 1 of the Sherman Act is dismissed as moot.

BACKGROUND

This consolidated action arises out of the purchase of the stock of AT&T Paradyne Corporation ("Paradyne") by affiliates of defendant TPG on or about July 31, 1996.[1] Defendant AT&T is a long distance and wireless services provider. (*See* Aff. of Thomas Arnold in Supp. of AT&T

---

[1] It appears that defendant TPG as an entity was not a signatory to the Purchase Agreement entered into for the sale of AT&T Paradyne on or about June 18, 1996. Rather, the Purchase Agreement was signed by representatives of five entities, each having some interconnection with defendant TPG. However, plaintiffs have named only TPG as a defendant in this matter because that is the entity which was the ultimate purchaser of AT&T Paradyne. This discrepancy was noted at oral argument, whereupon plaintiffs' counsel indicated that it was a distinction without a difference for purposes of this motion. (*See* Tr. of Hr'g at 21-22.) Defendants appear to agree with plaintiffs on this point. (*See* AT&T's Mem. in Supp. at 3 n.2.) Accordingly, for ease of reference, the Court will adopt the parties' designation of TPG as indicating the entity which purchased AT&T Paradyne.

and Lucent's Mot. for Summ. J. "Arnold Aff." ¶ 3.) Defendant Lucent designs and manufactures networking systems and software for communications service providers and manufactures consumer telecommunications products. (*Id.* ¶ 4.) Paradyne manufactured and continues to manufacture network access products that are used world-wide. (*Id.* ¶ 5.)

AT&T owned Paradyne from 1989 through July 1996. In August 1995, because Paradyne was not performing well financially, AT&T instituted a "Force Management Plan" that resulted in layoffs of certain Paradyne employees. (*Id.* ¶ 6.) In addition, as a result of Paradyne's poor economic performance, management at AT&T decided to sell Paradyne rather than close its operations entirely. On October 18, 1995, AT&T announced its decision to sell Paradyne.

AT&T and Lucent explain that as consumers of Paradyne's network access products, both companies were interested in making sure that Paradyne remained intact as a company. (AT&T Defs.' Br. in Supp. at 4.) To that end, defendants state that AT&T adopted a plan to help preserve and maintain Paradyne's human resource skill base to ensure Paradyne's marketability while negotiating the sale. (*Id.*) Accordingly, as of October 18, 1995, AT&T placed restrictions on the ability of employees of Paradyne to transfer to other parts of AT&T. This preliminary hiring restriction will be referred to herein as "the AT&T preliminary net." The AT&T preliminary net applied to all employees of Paradyne who were not identified as "at risk" employees in connection with the Force Management Plan, unless the employee had accepted another offer from another part of AT&T prior to

October 18, 1995.[2] Moreover, if a Paradyne employee voluntarily resigned from Paradyne after the institution of the AT&T preliminary net, that employee would be ineligible to be hired by any other part of AT&T or its affiliates. (Crowley Certif., Ex. C at 2.) It is undisputed that the AT&T preliminary net was put into place prior to the institution of negotiations between representatives of affiliates of TPG and any other party for the purchase of Paradyne. (Certif. of David M. Fabian in Supp. of TPG'S Mot. for Summ. J. ("Fabian Certif.") ¶ 8; Certif. of Sherril Claus Melio in Supp. of TPG's Mot. for Summ. J. ("Melio Certif.") ¶ 3; Arnold Aff. ¶ 8.)

Beginning in or about 1995, as a part of a business reorganization, AT&T had begun to separate and sell certain of its various business units. This process will be referred to herein as "the AT&T Trivestiture."[3] (Arnold Aff. ¶ 9.) AT&T eventually split into three independent companies — AT&T,

---

[2] As explained in the text, if a Paradyne employee was identified as an "at risk" employee, the AT&T preliminary net did not apply to that person. Accordingly, internal memoranda provided in discovery indicate that those Paradyne employees identified as "at risk" were to be given first priority in consideration for available jobs within AT&T. (Crowley Certif., Ex. C: Memorandum dated 11-30-95 from Human Resource Deployment Control Center to "HR Leaders.") The reductions in staff implemented in connection with the Force Management Plan, and the "at risk" employees identified as such in connection with the Force Management Plan, are not the subject of this lawsuit.

[3] The AT&T Trivestiture was announced approximately two days after the AT&T preliminary net was put into place. (Melio Certif. ¶ 4.)

Lucent and NCR Corporation. As part of the separation plan, AT&T transferred Paradyne to Lucent, which was a majority-owned subsidiary of AT&T throughout the period during which the sale of Paradyne was conceived, negotiated and completed on July 31, 1996.[4] As part of the AT&T Trivestiture, AT&T and Lucent developed a centralized listing of job opportunities on the companies' electronic bulletin board. (Arnold Aff. ¶ 10.) Paradyne employees restricted by the AT&T preliminary net were not eligible for consideration for any of the job listings.

Lucent started negotiations with TPG in or around April 1996. (Melio Certif. ¶ 10.) During that time period, TPG hired Godwins, Book & Dickerson ("Godwins") to perform due diligence on Paradyne and to make recommendations as to the benefits plan that should be provided to Paradyne employees if TPG were to purchase Paradyne. (Melio Certif. ¶ 11.) Between December 1995 and January 1996, Paradyne's Human Resources Vice President, Sherril Claus Melio, prepared models for potential benefits packages for the employees of the new Paradyne in anticipation of a sale of the company to a third party. After preparing these models, Melio concluded that in order for the new Paradyne to compete in the marketplace, the new Paradyne could not offer to its employees a defined benefits program such as the one offered by AT&T through the AT&T Management Pension Plan and the AT&T Pension Plan.[5] (*Id.* ¶ 7.)

---

[4] Lucent was originally known as NS-MPG, Inc. and was a wholly-owned subsidiary of AT&T until April 1996. NS-MPG, Inc.'s name was changed to Lucent Technologies Inc. on February 6, 1996. In April 1996, AT&T sold approximately 15 percent of Lucent stock. Thus, AT&T was still at that point a majority shareholder in Lucent. Lucent remained a majority-owned subsidiary of AT&T until in or about October 1996, at which point it became an independent company.

Representatives from Godwins met with Melio in April 1996 during the process of due diligence, and discussed, among other things, Melio's conclusions regarding potential benefits packages for the new Paradyne's employees. (*Id.* ¶ 11.) Melio certifies that the Godwins representatives had independently reached the same conclusion that Melio had determined, namely, that the defined benefits plan would have to be eliminated in order for Paradyne to become competitive. (Melio Certif. ¶ 12.) The evidence further demonstrates that the type and amount of compensation to be paid to Paradyne employees by TPG as the company's new owner was determined solely by Thomas Epley, Chairman and Chief Executive Officer of the new Paradyne, and TPG. (Fabian Certif., Ex. I: TPG's Response to Plaintiffs' "Dispositive Motion Interrogatories" no. 17.) Neither Lucent nor AT&T had any involvement in the employee compensation levels established by Paradyne after its acquisition by TPG, nor in the company's decision post-sale not to offer a defined benefits package to its employees.[6] (*Id.*; *see also* Melio Certif. ¶¶ 13-14.)

---

[5] The exact contours of the AT&T defined benefits plan are not specified in the record.

[6] The parties do not delve into the exact nature of the benefits offered by the new Paradyne to the former employees of AT&T Paradyne post-sale. We have reviewed the record and found limited information relating to the benefits and pension plans offered to

(Cont'd)

The negotiations between Lucent, AT&T and TPG culminated in the execution of a Purchase Agreement dated as of June 18, 1996 ("the Purchase Agreement") among Lucent, AT&T Paradyne and various affiliates of TPG. In Paragraph 4.5 of the Purchase Agreement, Lucent agreed on its own behalf and on behalf of AT&T and any AT&T affiliate that prior to the closing of the acquisition, those companies would not hire, retain, offer to hire or retain, or solicit the services of any Paradyne employee or consultant

---

(Cont'd)
employees of the new Paradyne. A memorandum issued on June 19, 1996 from the new Paradyne's future CEO indicates the company's intentions regarding pension and benefits plans, but that memorandum does not reflect the status of those plans post-closing. For example, the memo states that the benefits plans offered by the new Paradyne were going to be "substantially similar, and in some cases improved." (Crowley Certif. Ex. G.: Memorandum from Tom Epley to "The People of Paradyne" dated 6-19-96.) It also indicates that the employees' participation in AT&T pension plans, the AT&T retiree medical plan and other benefits associated with retirement, would be "discontinued going forward." It states further that "[w]e have created a new Retirement Savings Plan," and then sets forth the particulars of that new plan. It thus appears that the acquirer intended that the employees' participation in the AT&T pension plan would be discontinued as of the date of the sale, and that those employees would then be covered by a new pension plan developed by the new Paradyne. (*Id.*)

This information, however, contradicts statements in plaintiffs' Complaint regarding pension plan opportunities at the new Paradyne post-closing. Paragraph 47 of the Daley Complaint indicates that certain plaintiffs were at the time of the filing of the Complaint, still employed at the new Paradyne. The Complaint further states that their employment at the new Paradyne did not include any type of pension plan. (Daley Compl. ¶ 47.)

whose annual income exceeded $50,000 in 1996. (*Id.*, Ex. A: Purchase Agreement.) This aspect of the Purchase Agreement will be referred to herein as "the pre-closing net."[7] Defendants contend that Paragraph 4.5 reflected TPG's desire that certain employees of Paradyne, whose expertise and talents were viewed as a substantial asset, would remain Paradyne employees for a sufficient period of time for TPG to ensure the continued success of Paradyne during the company's transition of ownership and leadership. (Fabian Certif. ¶ 10, Ex. I at 6; Arnold Aff. ¶ 14.)

The pre-closing net was effective until the closing date of the sale, which was July 31, 1996. On July 31, 1996, in addition to other documents executed at the closing of the Paradyne sale, Lucent executed an "Employee Matters Agreement." The Employee Matters Agreement states in paragraph 1.3 that Lucent, AT&T and affiliates of the two companies agree that for 245 days (approximately 8 months) after the closing of the Paradyne sale, neither company would hire or solicit the services or any Paradyne employee or consultant whose 1996 compensation exceeded $50,000 unless the employee was terminated from Paradyne after the closing date or was a particular, identified individual for whom an exception had been made.[8] (Arnold Aff. ¶ 13,

---

[7] Alternatively, throughout this Opinion, the pre-closing net and the post-closing net may be referred to either separately or collectively as the "no-hire agreement" or "no-hire agreements."

[8] Plaintiffs point out that even if certain Paradyne employees were terminated after the closing date, or if they did not make more than $50,000, thus exempting them from the post-closing net, those employees seeking reemployment with AT&T or Lucent would not

(Cont'd)

Ex. B.) This aspect of the Employee Matters Agreement will be referred to herein as the "post-closing net." Defendants maintain that TPG required the implementation of the post-closing net in order to preserve and maintain Paradyne's human resource skill base. (*Id.* ¶ 15; see also Defs.' Answers to Pls.' Interrogatories at Response no. 1.) TPG initially proposed a no-hire period of 24 months, but after negotiations between AT&T and Lucent, accepted the 245-day duration. (Arnold Aff. ¶ 16.) This 245-day post-closing net thus extended from July 31, 1996 to April 3, 1997.

The practical effect of the 245-day post-closing net meant that the former employees of Paradyne who were subject to the net would suffer a break in service from AT&T and/or Lucent for more than 6 months. A break in service for that amount of time affected the employees' bridging rights under the AT&T Management Pension Plan. Section 7.4(a)(i)(1) of the AT&T Management Pension Plan allows employees to bridge their service following termination of employment from AT&T if they return within 6 months. If, however, employees returned after six months, under Section 7.4(a)(i)(2), they must continue their employment for an additional five years in order to bridge their prior service for purposes of determining when they are eligible to commence receipt of their pension payments.[9] (Arnold Aff. ¶ 17.)

(Cont'd)
be given preference, nor would they be able to participate in the job replacement program in place at the two companies in connection with the AT&T Trivestiture. Those former AT&T Paradyne employees would be treated as "external hires." (Crowley Certif., Ex. I.)

[9] Section 7.4(a)(i) of AT&T's Management Pension Plan provides in pertinent part:

(Cont'd)

Appendix C

The AT&T preliminary net, the pre-closing net, and the post-closing net are at the heart of the Complaints filed in this matter. On July 24, 1996, prior to the Paradyne closing, plaintiffs Eichorn, Huckins, Kiang, Landis and Napolitano

---

(Cont'd)

> **Breaks in Service**
>
> Except to the extent provided in Section 8, the following rules in Section 7.4(a)-(f) shall apply to all Employees in all cases.
>
> a. General Provisions — except for Pension Plan Participation and Vested Pension Eligibility
>
> (i) Any absence from the service without pay, including any period during which a person is employed by a Former Affiliate unless transferred to or reemployed by a Participating Company . . . [other than circumstances not here applicable] . . . shall be considered as a break in the continuity of service and if any person is reemployed after such a break in the continuity of his or her service, the individual's Term of Employment shall be reckoned from the date of such reemployment; provided, however, that (1) any break in the continuity of or absence from the service that does not exceed 6 months shall be considered as a leave of absence if return to active service from such an absence occurs on or after October 1, 1980, and (2) any break in the continuity of or absence from service shall be considered as a leave of absence upon completion by an Employee, who had previously completed six months of continuous service, of 5 years of continuous service after termination of the absence.

(Arnold Aff., Ex. C.)

(collectively the "Eichorn plaintiffs") filed their Complaint in this Court. The representative Eichorn plaintiffs were employed at Paradyne's facilities either in Holmdel, New Jersey or Middletown, New Jersey at salaries in excess of $50,000. (Eichorn Compl. ¶ 3 (a), (d).) The Eichorn Complaint alleges that AT&T entered into a "combination and conspiracy" with defendants Lucent and TPG and agreed

> to boycott and refuse employment to any of the Paradyne employees on any basis whatsoever for a period starting on or about October 18, 1995 and continuing for a period of eight months following the sale of the Paradyne business, and to thereafter refuse any employment that would afford Paradyne employees continuity of pension benefits or otherwise treat them as anything but newly hired persons.

(*Id.* ¶ 23.) The Eichorn plaintiffs allege that the employee "net" (with no effort to distinguish between the AT&T preliminary net, pre-closing net and post-closing net) constitutes an unlawful group boycott in violation of 15 U.S.C. § 1. (*Id.* ¶ 29.) Moreover, plaintiffs allege that Paradyne's ultimate decision not to offer a defined benefits package to its employees constituted illegal price fixing in violation of Section 1 of the Sherman Act. The Eichorn Complaint further avers that the "concerted refusal to hire Paradyne employees" was designed to remain in effect for a specific period to prevent plaintiffs from "attaining or enjoying the benefits of the pension-bridging provisions" to which they were entitled as pension plan participants. Plaintiffs allege that AT&T and Lucent's conduct in that regard violated plaintiffs' rights protected under Section 510 of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140.[10] (*Id.* ¶ 35.)

The Daley Complaint (Civil Action No. 96-4674 (MLC)) was filed in this Court on October 3, 1996 by plaintiffs Daley, DiBona, King, Oratowski, Salisbury and Walsh (collectively the "Daley plaintiffs"). The Daley Complaint purports to expand the class identified in the Eichorn Complaint to include "all regular" employees of Paradyne since October 18, 1995, who were not eligible for retirement from AT&T or Lucent on July 31, 1996. (Daley Compl. ¶¶ 1, 4.) The Daley plaintiffs allege the same causes of action as the Eichorn plaintiffs: (1) violation of 15 U.S.C. § 1 through unlawful "group boycotting," and "illegal price fixing," and (2) violation of § 510 of ERISA, 29 U.S.C. § 1140, stemming from defendants' alleged interference with plaintiffs' bridging rights under the AT&T pension plan.[11]

---

[10] We understand plaintiffs' ERISA claim to be brought only against defendants AT&T and Lucent as plaintiffs' former employers. Plaintiffs have not provided any clarification on this point, and our reading of the Complaint confirms that the gravamen of the § 510 claim rests upon plaintiffs' rights under the AT&T pension plan, and AT&T and Lucent's alleged interference with those rights by the adoption and implementation of the 245-day no hiring agreement. We will analyze the merits of plaintiffs' § 510 with that understanding of the structure of the § 510 claim.

[11] The Daley plaintiffs raise an additional claim under ERISA. Plaintiffs assert that defendants AT&T and Lucent violated ERISA by not permitting Paradyne employees subject to the preliminary, pre- and post-closing nets to participate in the job replacement

(Cont'd)

The Daley Complaint was consolidated with the Eichorn Complaint under Civil Action No. 96-3587 (MLC) by Consent Order entered on this Court's docket November 19, 1996. (*See* docket entry no. 11.) Because both Complaints raise the same legal issues, the Court will address the viability the claims raised in both Complaints as if they were raised in a singular pleading. After an initial discovery phase limited only to information necessary in order to prepare dispositive motions on the issues of liability, the instant cross-motions for summary judgment were filed.

Defendants raise several arguments in support of dismissal of each of the claims raised in both Complaints. Those arguments may be best summarized in brief as follows.[12]

(Cont'd)
program which was established after the announcement of the AT&T Trivestiture. That program instituted a centralized job posting which assisted dislocated employees in obtaining replacement jobs within the AT&T, NCR and Lucent organizations. (Daley Compl. ¶ 59.) This claim will be examined separately in the Discussion Section, II, B, *infra*.

[12] The parties have diligently advanced several positions in support of their various claims and in response to their adversaries' arguments. We recognize that some of these contentions are not discussed in the text of this Opinion. However, we have fully considered all of the arguments raised both in the written submissions and during the extended oral argument before this Court. In the interest of brevity and clarity, we have limited our discussion to those arguments we deem central to our holding in this case. *See Gavalik v. Continental Can Co.*, 812 F.2d 824, 838 n.2 (3d Cir. 1987) (following similar structure and approach in the context of an appeal of a judgment entered for the defendants under § 510 of ERISA).

Turning first to plaintiffs' § 1 Sherman Act claim, defendants state that the Court should consider the validity of defendants' conduct by employing a "rule of reason" antitrust analysis rather than assuming that defendants' conduct is a *per se* violation of § 1, as the alleged "group boycott" which occurred in this case is in actuality an ancillary restraint to a lawful transaction. (AT&T's Br. in Supp. at 15; TPG's Br. in Supp. at 18.) From that premise, defendants maintain that plaintiffs' allegation that defendants conspired to perform a "group boycott" of Paradyne's employees fails under the rule of reason analysis because plaintiffs cannot demonstrate that they have suffered any "antitrust injury" as that phrase is understood under applicable antitrust principles. (AT&T's Br. in Supp. at 11; TPG's Br. in Supp. at 13.) Next, assuming *arguendo* that this Court determined that plaintiffs demonstrated a sufficient antitrust injury such that dismissal was unwarranted on that basis, defendants contend that the pre-closing and post-closing nets are not an unreasonable restraint of trade under the rule of reason analysis. (AT&T's Br. in Supp. at 19-25; TPG's Br. in Supp. 18.) Finally, defendants maintain that in order to allow the Court to perform a rule of reason analysis, plaintiffs are required to demonstrate sufficient evidence of a relevant product and geographic market. Defendants argue that plaintiffs' purported relevant geographic and product markets are erroneous as a matter of antitrust law, and as such, preclude this Court from performing any meaningful inquiry as to the injury caused by defendants' pre-closing and post-closing nets in the relevant market. Defendants suggest an alternative product and geographic market and proceed to argue that plaintiffs have provided no evidence of any adverse, anti-competitive effect within that relevant market. (AT&T Defs.' Br. in Supp. at 19; TPG's Br. in Supp. at 26-27.)

Defendants also move for summary judgment on plaintiffs' ERISA claims. Defendants argue that the time for discovery on plaintiffs' ERISA claims has ended, and that plaintiffs have no evidence which demonstrates an ERISA violation. Moreover, defendants maintain that as a matter of law, defendants' conduct in agreeing to a post-closing net for a period of 8 months following the closing on July 31, 1996 cannot fall within the scope of prohibited employer conduct under § 510, and that even if it could so qualify, the evidence demonstrates that defendants did not have a specific intent to violate ERISA.

Plaintiffs, in contrast, argue that this Court should enter judgment as a matter of law on the issue of defendants' liability under § 1 of the Sherman Act at this juncture. Plaintiffs argue that defendants' pre-closing and post-closing nets are classic examples of a "group boycott" to which a *per se* antitrust analysis is appropriate, as it is clear that such conduct requires "condemnation without inquiry into the actual market conditions." (Pls.' Br. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Br. in Supp.") at 14-25.) Alternatively, plaintiffs maintain that the Court should employ a "quick look" analysis and find defendants' pre-closing and post-closing net as violative of under that standard. (*Id.*) Plaintiffs recite numerous cases which they argue amply support their position that defendants' "lock-out" of Paradyne employees constitutes a *per se* violation of the Act, as agreements between employers to restrict job opportunities have been consistently recognized as violative of Section 1. (Pls.' Br. in Opp'n to Defs.' Mot. for Summ. J. ("Pls.' Br. in Opp'n") at 15-25.) Plaintiffs further state that the employee boycott which occurred in this case cannot be justified as an ancillary restraint because AT&T agreed to the boycott, and AT&T was not a party to the sale of Paradyne to TPG. (Pls.' Br. in Supp. at 35.) Finally, plaintiffs argue that they have established antitrust injury in this case, as all that is necessary is that plaintiffs' damages "be attributable to an anti-competitive aspect of the practice under scrutiny." (*See* Pls.' Br. in Supp. at 39.)

With respect to the ERISA claims, plaintiffs contend that they "have never contemplated that the present motions would address plaintiffs' claim that defendants violated § 510 of ERISA." (Pls.' Br. in Opp'n at 29.) Plaintiffs state that the initial discovery which has occurred to date in this matter was limited only to written discovery pursuant to an Order by Magistrate Judge Wolfson. Plaintiffs' counsel submitted an affidavit pursuant to Federal Rule of Civil Procedure 56(f) which attests to the need for further discovery to oppose defendants' motions targeting the ERISA claim. (*Id.*; *see* Certif. of Neil Crowley, Esq. pursuant to Fed. R. Civ. P. 56(f) ("Crowley Rule 56(f) Certif.").) Moreover, plaintiffs assert that the "limited information" in the present record nonetheless demonstrates that defendants' motions directed to the ERISA claim should be denied. (Pls.' Br. in Opp'n at 40.)

DISCUSSION

Federal Rule of Civil Procedure 56 states that in order for the Court to enter summary judgment, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, [must] show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "The substantive facts will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only if a fact might affect the outcome of the suit is it material. *Id.*

The non-moving party must make a "showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *See Celotex*, 477 U.S. at 322. The non-moving party cannot just rely "upon bare assertions, conclusory allegations or suspicions." *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.), *cert. denied*, 474 U.S. 1010 (1985). The Court resolves conflicting evidence in favor of the plaintiff, does not engage in credibility determinations, and draws all reasonable inferences in favor of the plaintiff. *See Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (en banc).

I. Antitrust Claims under Section 1 of the Sherman Act

A. Group Boycott

We begin our analysis with the gravamen of plaintiffs' antitrust claims, namely their contention that the no-hire agreements at issue in this case amount to a group boycott in violation of Section 1 of the Act. Our discussion herein focuses solely upon plaintiffs' contentions regarding the antitrust implications surrounding the pre-closing net and post-closing nets.[13] Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The Supreme Court has long recognized that Section 1 of the Sherman Act is intended to prohibit only unreasonable restraints of trade. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988).

Plaintiffs bear the initial burden of proving under Section 1 of the Sherman Act that any concerted action that did take place caused an "antitrust injury" by imposing an unreasonable restraint on trade. The focus of the antitrust laws is on promoting competition. *National Collegiate Athletic Ass'n. v. Board of Regents*, 468 U.S. 85, 103 (1984). Consequently, a plaintiff cannot satisfy his or her burden of establishing an antitrust injury by merely showing that it caused the plaintiff an economic injury. *See Tennessean Truckstop Inv. v. NTS, Inc.*, 875 F.2d 86, 88 (6th Cir. 1989). Antitrust injury has thus been described as meaning "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) Implicit in this definition are two analytical issues. First, the claimed injury must be of a type that the antitrust laws were meant to discourage. Second, the plaintiff's injury must be causally related to the defendant's anticompetitive acts. Even a plaintiff who challenges an action that is determined to be *per se* illegal must show that the defendants' illegal conduct has caused him antitrust injury. *Newman v. Universal Pictures*, 813 F.2d 1519, 1522-23 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988).

---

[13] To the extent that plaintiffs attempted to assert in their Complaints a § 1 violation based upon the AT&T preliminary net, such a claim would be precluded by the Supreme Court's decision and reasoning in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) and its progeny. As of October 18, 1995, the date that the preliminary net was put in effect by AT&T, Lucent was a wholly-owned subsidiary of AT&T, and accordingly, the two companies were a singular entity that could not conspire to violate the antitrust laws. *See supra* note 4. Moreover, the evidence demonstrates that the AT&T preliminary net was put into place prior to any negotiations with TPG. (Fabian Certif. ¶ 10, Ex. I at 6; Melio Certif. ¶ 6.)

To assess the reasonableness of a restraint on trade, courts have taken one of two approaches. "In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality — they are 'illegal per se.' " *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 692 (1978). The second approach to analyzing restraints is termed a "rule of reason" method. Under a "rule of reason" analysis, which we find appropriate here,[14] plaintiffs have the burden of establishing that, under all of the circumstances, the challenged acts are "unreasonably restrictive of competitive conditions" in the relevant market. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 28 (1911); *see also National Soc'y of Prof'l Eng'rs*, 435 U.S. at 690. "An analysis of the reasonableness of particular restraints includes the consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972). In utilizing the rule of reason analysis to examine the reasonableness of a

---

[14] Plaintiffs' protestations notwithstanding, it is clear that this case must be governed by a rule of reason analysis rather than simply labeling defendants' conduct as a "group boycott" and thus subjecting the pre-closing and post-closing nets to *per se* treatment under the antitrust laws. The *per se* approach has generally been limited to those "classic" group boycott cases in which a group of competitors seeks to economically benefit by excluding other competitors from the marketplace. *See Larry v. Muko, Inc. v.*

(Cont'd)

(Cont'd)
Southwestern Pa. Bldg. and Const. Trades Council, 670 F.2d 421, 429-30 (3d Cir. 1982). For an agreement to be deemed *per se* illegal, it must be shown to have a "pernicious effect on competition and lack of any redeeming virtue. . . ." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Accordingly, the *per se* rule of illegality should be applied only to "naked restraints of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Here, it is clear that the no-hire agreements at issue qualify as ancillary restraints, and are thus subject to a rule of reason analysis. Our research has uncovered only two cases in which a plaintiff has attempted to base an antitrust claim upon a no-hire agreement made in connection with the sale of a business such as the ones executed in connection with the Paradyne sale. In both cases, the courts rejected the plaintiffs' attempts to invoke a *per se* analysis. *See Coleman v. General Elec. Co.*, 643 F. Supp. 1229 (E.D. Tenn. 1986), *aff'd*, 822 F. 2d 59 (6th Cir. 1987); *Cesnik v. Chrysler Corp.*, 490 F. Supp. 839 (M.D. Tenn. 1980). Moreover, we reject plaintiffs' argument that those cases are inapposite because they are factually distinguishable from this case. To the extent that those cases present slightly different factual scenarios from the instant case, we find that those distinctions have no bearing on the applicability of the holdings to the present suit.

particular restraint, it is incumbent upon plaintiffs to define the relevant product and geographic market so that an analysis of the existing circumstances in that market can proceed. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). In this connection, plaintiffs must demonstrate that defendants' actions diminished competition in the relevant product and geographic markets.

Applying these relevant principles to plaintiffs' allegations and proofs, we find that defendants are entitled to summary judgment on plaintiffs' Section 1 claim based upon the no-hire agreements executed in connection with the Paradyne sale. First, we conclude that plaintiffs have failed to provide any evidence of sufficient antitrust injury. Plaintiffs apparently argue that the injury to competition is that they are prevented from providing their services to AT&T, Lucent or its affiliates. Put simply, the antitrust laws are not concerned with injury to competitors (here plaintiffs), but with injury to competition. *See Brunswick Corp.*, 429 U.S. at 488 ("Antitrust laws . . . were enacted for the protection of competition, not competitors.") (quoting *Brown Shoe Co.*, 370 U.S. at 320). That these plaintiffs are prevented from working at AT&T, Lucent or their affiliates for the limited time period during which the pre-closing and post-closing nets were in effect is not an injury to competition unless plaintiffs can show that the no-hire agreements had an anticompetitive effect on the market. *See Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) (antitrust plaintiffs "must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors"). Here, there is no evidence of any anti-competitive effect on the employment market in which plaintiffs are involved. *Cf. Fuentes v. South Hills Cardiology*, 946 F.2d 196, 202 (3d Cir. 1991) (where physician alleged that other physicians with whom he worked conspired to deprive plaintiff of opportunity to provide medical services in Pittsburgh area by terminating plaintiff's medical privileges, court found that plaintiff pled sufficient antitrust injury because such conduct would reduce competition for defendants' medical services). In our view, plaintiffs' allegations of economic injury to themselves misperceive the nature of the injury which is required to be established in order to sustain a claim under Section 1 of the Sherman Act. The aphorism that "the antitrust laws were enacted for the protection of competition, not competitors" is particularly applicable to plaintiffs' contentions. *See Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328, 338 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 (1962)). Accordingly, we find that defendants are entitled to summary judgment on plaintiffs' Section 1 claim on this basis.

Assuming *arguendo* that the Section 1 claim survived an inquiry into whether plaintiffs suffered "antitrust injury" as that term is understood, we nonetheless conclude that plaintiffs' antitrust claim fails because plaintiffs have failed to demonstrate that the practice at issue is an unreasonable restraint on trade as that phrase is used under antitrust law. Under the rule of reason analysis, this Court must consider "the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." *Topco Assoc.*, 405 U.S. at 607. The purpose of such an analysis is to form a judgment about the competitive significance of the alleged restraint. *Id*. Here, TPG purchased the assets of Paradyne from Lucent, which was at the time a majority-owned subsidiary of AT&T. Plaintiffs do not suggest that the purchase of Paradyne itself violated the antitrust laws; rather, the allegation is that the parties' agreement restricting AT&T and Lucent from hiring certain Paradyne employees from June 18, 1995 through April 3, 1997 amounted to a "group boycott" of this applicant pool. Defendants maintain that the primary reason for these no-hire agreements was to permit TPG to retain the skilled services of certain employees so that the change of ownership would not disrupt the ongoing business. (Fabian Certif. II ¶ 2, Ex. A at 12; *see also* Crowley Certif., Ex. E: Memo from C.R. Artis dated 5-28-96 ("The purpose of the net is to prevent the loss of talent from Paradyne caused by internal recruiting from AT&T or Lucent or any of its units.") In our view, the pre-closing and post-closing nets at issue here are a subset of common law covenants not to compete. *See Cesnik v. Chrysler Corp.*, 490 F. Supp. 859, 867 (M.D. Tenn. 1986). Moreover, it is clear that the no-hire agreements imposed restrictions which were "ancillary to a legitimate transaction," and thus properly considered an ancillary restraint subject to the reasonableness standard of evaluation.[15] Accordingly, we will analyze the reasonableness of the no-hire agreements from that perspective.

---

[15] Plaintiffs argue that the no-hire agreements at issue are not ancillary restraints because AT&T was a third party to the Lucent/TPG sale of Paradyne, and the pre-closing and post-closing nets applied to AT&T as well as Lucent. (Pls.' Br. in Supp. at 37.) "In other words, [for AT&T], the boycott wasn't ancillary to anything, but was simply a naked restraint of trade." (*Id.* at 38.)

(Cont'd)

It is well established that covenants not to compete do not violate the antitrust laws so long as they are reasonable. *See United States v. Addyston Pipe & Steel*, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899). As the court in *Cesnik* recognized: "The question in every case (involving a covenant not to compete ancillary to the sale of a business) is whether the restraint is reasonably calculated to protect the legitimate interests of the purchaser in what he has purchased, or whether it goes so far beyond what is necessary as to provide a basis for the inference that its real purpose is the fostering of a monopoly." *Cesnik*, 490 F. Supp. at 868.

The Court finds that the pre-closing and post-closing nets at issue in this case were reasonably calculated to protect the legitimate interests of the purchaser. There is simply no

---

(Cont'd)

Such an assertion is belied by the facts as well as the practical realities of the transaction which occurred. First, we note that plaintiffs' characterization of AT&T as a third party is erroneous in light of the fact that Lucent was a majority-owned subsidiary of AT&T during the relevant time period. Moreover, it is equally obvious that AT&T's participation in the pre-closing and post-closing nets was necessary to accomplish the sale of Paradyne, as AT&T had recently owned Paradyne outright. Plaintiffs also attempt to argue that the no-hire agreements were independent of the Paradyne sale transaction. (Pls.' Br. in Opp'n at 30-31.) This assertion is contradicted by the plain language of the Purchase Agreement, which in no uncertain terms includes the pre-closing net in its provisions, and further states that at the closing, the parties will execute, *inter alia*, the Employee Matters Agreement. (Reply Aff. of David Michael Fabian ("Fabian Certif. II"), Ex. A: Purchase Agreement ¶ 1.8 "Additional Agreements"; Arnold Aff., Ex. A: Purchase Agreement ¶ 4.5 "Prohibition on Hiring.")

evidence in the record which indicates that the purpose of the pre-closing and post-closing nets was to stifle competition in the relevant market, or that there was in fact an anticompetitive effect. Plaintiffs, in their Complaints, recognize the importance of keeping the Paradyne workforce intact from the perspective of a prospective buyer of the company: "Paradyne's value as a business derives principally from the collective technical knowledge and specialized skills of its various employees." (Eichorn Compl. ¶ 10; Daley Compl. ¶ 22; *see also* Certif. of William J. Huckins, Ex. A: Interrogatory no. 5 (describing the specialized experience of some of the plaintiffs).) Likewise, the uncontroverted evidence presented to this Court demonstrates that AT&T, Lucent and TPG were concerned about preserving the workforce for the purpose of ensuring a smooth transition in ownership. (*See* Arnold Aff. ¶¶ 11-16; *see also* Crowley Certif., Exs. E, G.) Moreover, the anti-competitive impact resultant from the agreements, if any may be discerned at all, is incidental to the effective transition of ownership from AT&T/Lucent to TPG. *See Coleman*, 643 F. Supp. at 1242. Put simply, plaintiffs have offered no evidence demonstrating that the purpose of the arrangement was to restrain trade in the relevant labor market or to ensure reduced costs for labor in the relevant market. Plaintiffs, interpretation of the evidence and their arguments amount to nothing more than unsupported speculation which is insufficient to overcome defendants' summary judgment motion.

By necessity, then, we further find that the no-hire agreements do not "go far beyond what is necessary as to provide a basis for the inference that its real purpose is the fostering of a monopoly." *See Cesnik*, 490 F. Supp. at 868.

Here, the pre-closing net was in place from June 18, 1996 to July 31, 1996. The post-closing net was in effect for 245 days after the closing date, or until April 3, 1997. The duration of the no-hire arrangement undercuts plaintiffs' contention that the restraint was unreasonable as that term is understood under an antitrust analysis.[16] Moreover, the pre-closing and post-closing net applied only to Paradyne employees with income over $50,000 for year 1996 and excluded from its scope any person involuntarily terminated by Paradyne post-sale. Such limitations were directly related to defendants' desire to maintain the integrity of the company during the transition period post-sale. We also note that the restriction in place limited only plaintiffs' opportunities for employment with AT&T and Lucent. Plaintiffs were not restricted from seeking similar employment elsewhere, and there was no evidence that AT&T or Lucent dominated the relevant employment market. *See Coleman*, 643 F. Supp. at 1243 ("Any competition between the defendants here is "entirely conjectural . . . and the court cannot find that there was anything more than incidental, if that much, impact on the employment market."); *Cesnik*, 490 F. Supp. at 867 ("There are simply no grounds to support an inference that the agreement fostered [the employer's] monopoly on the market for employee services or anything else."). Accordingly, we find that the restriction at issue was "reasonably calculated to protect the legitimate interests of the purchaser in what he has purchased," and accordingly that defendants are entitled to summary judgment on plaintiffs' antitrust claims on this alternative basis.

---

[16] Plaintiffs make much of the fact that the practical effect of the 245-day time limitation meant that former employees of the old Paradyne lost their "bridging rights" which were granted to them under the AT&T/Lucent pension plan unless they remained reemployed at AT&T for five years. Plaintiffs condemn this effect, noting for example that "the acts of defendant impinged on the economic freedom of each and every plaintiff and denied them the opportunity to be considered by AT&T or Lucent." (Pls.' Br. in Supp. at 11.) The short answer to plaintiffs' argument is that they have presented no evidence to the Court which demonstrates that defendants' purpose in agreeing to a 245-day time period was to stifle competition in the relevant employment market and foster a monopoly. Put simply, plaintiffs ask this Court to draw the inference that the defendants must have intended to stifle competition based upon the fact that the no-hire provision foreclosed bridging for 5 years. Such an inference without supportive evidence is unreasonable. This observation, however, does not prohibit a finding that the 245-day no-hire agreement violated § 510 of ERISA. The focus of § 510 is whether defendants intended to interfere with the employees' rights under the AT&T pension plan and also whether defendants had the specific intent to violate ERISA. Thus the inquiry under § 510 is not whether defendants intended to stifle competition in the relevant market. (*See* Discussion, II., A., *infra.*)

Finally, there is in our view one additional independent basis for granting defendants' motion for summary judgment on this aspect of plaintiffs' antitrust claim. Implicit in our analysis of the reasonableness of the restraint at issue in this case is a consideration of the effect that the no-hire agreement had on the relevant market as a whole. We have stated that there is no evidence in the record which demonstrates a significant impact on the relevant market as a result of the pre-closing and post-closing nets effectuated by defendants. In reaching that conclusion, we have rejected plaintiffs' definition of the relevant product and geographic markets as erroneous as a matter of law, and have undertaken our own analysis to identify the relevant market for plaintiffs' employment services based upon the evidence which is of record.[17]

---

[17] Our own independent evaluation of the legal principles governing the determination of the relevant product and geographic markets demonstrates that the appropriate market for consideration is the market for the services of those employees affected by the agreement. *See Queen City Pizza v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997) (noting that the "test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but commodities reasonably interchangeable by consumers for the same purposes") Here, the commodity at issue is plaintiffs' services, and the issue of the relevant market must be determined from the standpoint of the consumer rather than the supplier. *See Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991) (relevant product market defined as those commodities reasonably interchanged by consumers for the same purposes). The evidence demonstrates that as to those plaintiffs which have been described as "technically proficient," there are at any given time "up to 20 DSL technology companies and an even larger number of network service providers who actively compete for employees with the skills and training possessed by those plaintiffs." (Melio Certif. II ¶ 9.) In contrast, plaintiffs argue that the product market should be limited "to producers and providers of sophisticated telephone and data communications systems and products." (Certif. of Roger Kiang ¶ 8; Huckins Certif., Ex. A: Interrogatory no. 5.) However, even assuming that the product market were limited as plaintiffs suggest, there are several companies which fall into that category. As to the plaintiffs with more generalized educational and work backgrounds, the product market for their services is broader. In fact, the evidence shows that those plaintiffs are qualified to perform a vast number of jobs, and that the market for those services is nationwide. (*See* Weber Aff. ¶ 6 (noting that plaintiffs' responses to interrogatories suggest that certain plaintiffs have found jobs in several parts of the United States before, during and after

(Cont'd)

At this stage of the litigation, plaintiffs have the burden of not only demonstrating an economic impact on the relevant market, but also establishing the threshold issue of the relevant geographic and product markets which may be examined in this context. More specifically, plaintiffs are required at this stage of the litigation to present evidence from which a rational person could conclude that the relevant markets actually are what plaintiffs allege them to be in their Complaints, and that defendants' conduct produced anticompetitive effects within the relevant market. *See Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 749-50 & n.5 (3d Cir. 1996) (noting four elements that plaintiff must prove to establish a Section 1 claim, and that plaintiff bears burden of pointing to admissible evidence that would be sufficient to show all elements of a prima facie case under substantive law); *see also Okansen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) (noting that plaintiff asserted with little proof a narrow market definition which conformed to where plaintiff preferred to be employed, but nonetheless violated fundamental principle of antitrust law that the relevant market definition must encompass the realities of competition); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 217 (D.C. Cir. 1986) (noting that plaintiffs failed to offer to the district court any evidence to support their contention that there existed distinct product

---

(Cont'd)
employment with Paradyne); *see also id.*, Ex. D: Interrogatories of Gilbert Daley at no. 3; *id.*, Ex. D: Interrogatories of Susan DiBona at no. 3; *id.*, Ex. D: Interrogatories of Thomas Salisbury at no. 3; *compare id.*, Ex. D: Interrogatories of Beth King at no. 3 *with* King Certif. ¶ 2; *compare* Certif. of Lawrence Walsh ¶ 2 *with* Weber Aff., Ex. D: Interrogatories of Lawrence Walsh at no. 3).)

and geographic sub-market; district court was left to consider the national market as the relevant product and geographic market for product at issue). Not only is it clear that plaintiffs failed to identify correctly the relevant geographic and product markets, they did not even attempt to provide any evidence in support of their contentions regarding the relevant geographic and product markets.[18] Accordingly, defendants are entitled to summary judgment on this alternative basis.

B. Illegal Price Fixing

We interpret plaintiffs' Complaints as alleging that Paradyne's ultimate decision not to offer a defined benefits package to its employees constituted illegal price fixing in violation of Section 1 of the Sherman Act. (Eichorn Compl. ¶¶ 27, 29; Daley Compl. ¶¶ 40, 52.) We find that summary judgment on plaintiffs' price fixing claim is appropriate for two reasons. First, as we have already held, plaintiffs have not provided any evidence of an "antitrust injury." *See* Discussion, at I., A., *supra*. Assuming *arguendo* that plaintiffs' claim survived that initial hurdle, plaintiffs have offered no evidence to demonstrate that defendants conspired to restrain trade. In fact, the uncontroverted evidence demonstrates that neither AT&T nor Lucent played any role in the determination of the salaries or benefits that were offered to Paradyne employees post-sale. (Melio Certif. ¶ 14; Fabian Certif., Ex. I at no. 17.) Moreover, plaintiffs admitted through discovery interrogatories that their price fixing claim was based on "information and belief" as well as "logical assumptions." However, such unsupported speculation fails to satisfy the summary judgment inquiry. *See Celotex*, 477 U.S. at 324. Accordingly, summary judgment on this aspect of plaintiffs' antitrust claim is appropriate.

---

[18] Here, the Eichorn plaintiffs define the relevant market for plaintiffs' services to be "potential employers within a 35-mile radius of Holmdel/Middletown with the capacity and capability of employing or utilizing large numbers of persons with specialized experience in high speed data communications equipment of the sort Paradyne develops and makes . . . [w]ho can provide continuity of the pension benefits which have accrued to [plaintiffs] under the AT&T and/or Lucent pension plans." (Eichorn Compl. ¶¶ 13, 14.) In the Daley Complaint, plaintiffs allege that "job opportunities within commuting distance of their present homes serves to define potential product and geographic markets as a supplement and alternative to a market defined by pension continuity." (Daley Compl. ¶ 29.) Put simply, plaintiffs have alleged a product and geographic market that would permit plaintiffs only to provide their services to AT&T and/or Lucent.

II. ERISA § 510 Claim

A. Plaintiffs' Claim as Premised upon the Post-Closing Net

Plaintiffs allege that the "concerted refusal to hire Paradyne employees which was agreed upon between AT&T, Lucent, Texas Pacific and others . . . was designed to remain in effect for eight months . . . for the precise reason and express purpose of preventing the Paradyne workers from attaining or enjoying the benefits of the pension-bridging provisions to which they are entitled as pension plan participants." (Daley Compl. ¶ 57; Eichorn Compl. ¶ 34.) Thus, the first aspect of the ERISA claim is premised upon AT&T and Lucent's adoption and implementation of the post-closing net which was in effect at TPG's behest for 245 days after the closing date, or until April 3, 1997.[19]

Section 510 of ERISA, found at 29 U.S.C. § 1140, provides in relevant part:

> It shall be unlawful for any person to discharge, fire, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the employee benefit plan . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

Id. Defendants argue that plaintiffs' claim is premised upon the fact that the post-closing net prevented AT&T and Lucent from rehiring any Paradyne employees for a certain period of time. Framing the issue as such, defendants maintain that § 510 does not apply to an employer's refusal to rehire former employees, and thus, there can be no liability for defendants' conduct under § 510. (AT&T's Br. in Supp. at 27.)

---

[19] We read this aspect of plaintiffs' § 510 claim to be premised only upon the adoption and implementation of the post-closing net because plaintiffs' bridging rights were affected only by virtue of the fact that the post-closing net was in place for 8 months and the AT&T pension plan only permitted bridging if the separation in service were for 6 months or less. Plaintiffs were not separated from the employ of AT&T and/or Lucent until the date of the closing such that the alleged "interference" with plaintiffs' bridging rights under the AT&T pension plan did not commence until plaintiffs were unable to seek employment with AT&T and Lucent post-closing.

Defendants misconstrue the nature of plaintiffs' claim as well as the breadth of § 510. The gravamen of this aspect of plaintiffs' ERISA claim is that defendants adopted and implemented the post-closing net, and that such conduct in itself amounts to "discrimination" which is prohibited by § 510. In this regard, the challenged action by the employer is akin to the "Liability Avoidance Program" at issue in the Third Circuit's decision in *Gavalik v. Continental Can Co.*, 812 F.2d 834, 855 (3d Cir. 1987). There the court addressed and rejected a similar argument made by the defendant/employer. The court recognized that the implementation of a plan may under certain circumstances constitute discriminatory conduct violative of § 510. *Id.*; *see also Haberern v. Kaupp Vascular Surgeons Pension Plan*, 24 F.3d 1491, 1503 (3d Cir. 1994) (noting that courts construing the word "discriminate" in § 510 have concluded, consistent with *Gavalik*, that the term should be limited to actions by the employer affecting the employer/employee relationship). We thus conclude that defendants are not entitled to summary judgment on the basis that defendants' conduct does not fall within the purview of § 510.

Defendants raise an alternative argument for dismissal of this aspect of plaintiffs' § 510 claim. Defendants argue that the evidence fails to demonstrate a genuine issue of material fact concerning defendants' motivation in the adoption and implementation of the post-closing net at issue here. Defendants maintain that the record is replete with evidence that the post-closing nets were effectuated at the behest of the purchaser (TPG) and in furtherance of a legitimate business purpose — namely, to preserve the greatest asset of Paradyne and ensure the company's smooth transition of ownership. (AT&T Defs.' Br. in Supp. at 30-32.)

Courts have adopted the burden-shifting mechanism developed in the context of other employment discrimination lawsuits in order to analyze a discrimination claim under § 510. *See Gavalik*, 812 F.2d at 851-52. Thus, plaintiff must first establish a prima facie case. To establish a prima facie case under Section 510, an employee must demonstrate: (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled. 29 U.S.C. § 1140; *see Gavalik*, 812 F.2d at 852.

Once the plaintiffs establish a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged action. *Id.*; *see also Hendricks v. Edgewater Steel Co.*, 898 F.2d 385, 389 (3d Cir. 1990). If the company articulates a legitimate reason, the burden is then on the employee to show that the reason was pretextual, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Gavalik*, 812 F.2d at 852 (citations omitted).

A plaintiff is not required to prove that the sole reason for the adverse employment action was to interfere with his pension rights. *Id.* at 851. However, a plaintiff must prove that the defendant had the "specific intent" to interfere with the plaintiff's pension rights in violation of ERISA. *Id.* In other words, plaintiffs "must show that the employer made a conscious decision to interfere with the employee's attainment of pension eligibility or additional benefits." *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 522

(3d Cir. 1997). While plaintiffs may use circumstantial evidence to establish the requisite intent, the fact of termination alone will not satisfy plaintiffs' burden. *See id.* at 522-23. The Third Circuit has stated, however, that plaintiffs could introduce " 'evidence that the savings to the employer resulting from [the plaintiffs'] termination were of sufficient size that they may be realistically viewed as a motivating factor.' " *Id.* at 523 (quoting *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 347 (3d Cir. 1990)). This would be sufficient, assuming the other elements of the prima facie case have been established, to shift the burden of production to the defendant. *Id.* at 522.

Plaintiffs oppose defendants' motion for summary judgment on two grounds. First, they argue that they were unaware that these dispositive motions would be directed at plaintiffs' ERISA claims. Thus, plaintiffs' counsel has filed an affidavit pursuant to Rule 56(f) setting forth the reasons why additional discovery is necessary. Plaintiffs' counsel states that to date, only written discovery has been exchanged because it was his understanding that the motions would be limited to plaintiffs' antitrust claims. Counsel states that the ERISA claim will not be ripe for adjudication until plaintiffs have had the opportunity to take the depositions of the "cognizant company representatives to determine all of the reasons that the relevant business transaction was structured as it was." (Crowley Rule 56(f) Certif. ¶ 8.) Plaintiffs have also furnished handwritten notes of unknown authorship which contain notations concerning the possible loss of bridging rights as a consequence of the structure of the no-hire agreements at issue here. (*See* Crowley Certif., Ex. J.) Plaintiffs' counsel states that "discovery to determine who authored these notes and what they signify would be [the] minimum requirement for properly responding to the ERISA portion of defendants' motion." (Crowley Rule 56(f) Certif., Ex. ¶ 10.)

Second, plaintiffs maintain that even if the Court were to entertain defendants' motion at this juncture, the Court should deny the motion because there is sufficient evidence in the record from which a jury could find that defendants violated § 510. Plaintiffs point principally to the handwritten notes which they claim "contain substantial indications that the job boycott was planned and directed with full awareness that it would defeat plaintiffs' so-called pension bridging rights." (Crowley Rule 56(f) Certif. ¶ 9; *see also* Pls.' Br. in Opp'n at 40.)

We begin with plaintiffs' request for additional discovery on their § 510 claim. Put simply, the scheduling orders entered in this case make it clear that discovery was to be conducted for the purpose of preparing dispositive motions relating to the liability aspect of plaintiffs' claims. However, there is no indication that the discovery was limited such that depositions of the company representatives could not have been undertaken by plaintiffs. Nothing in those orders indicates that the discovery was limited to an exchange of documents relating only to defendants' liability under plaintiffs' antitrust claims. During that discovery phase, defendants clearly put plaintiffs' ERISA claims in issue by propounding discovery requests relating to those claims. At that juncture, plaintiffs should have realized at the very least that it was defendants' understanding that the discovery was not limited so as to restrict plaintiffs from seeking discovery on their ERISA claims. Accordingly, we deny plaintiffs' request for additional time for discovery.[20]

We decline, however, to grant defendants' motion on this ERISA claim, as it is clear to the Court at this juncture that there are genuine issues of material fact which preclude summary judgment. First, we note that plaintiff's proofs, if presented in admissible form at trial, would be sufficient to establish a prima facie case. Plaintiffs point to AT&T and Lucent's adoption and implementation of the post-closing net as the alleged prohibited employer conduct. Plaintiffs next state that the post-closing net was implemented for the purpose of interfering with plaintiffs' bridging rights under the AT&T pension plan. To that end, plaintiffs point to the fact that both AT&T and Lucent realized substantial economic gain as a result of the sale and 8 month hiring freeze. (Pls.' Br. in Opp'n at 40.)

---

[20] 20. We recognize that at most, plaintiffs seek additional discovery relating to the author of the handwritten notes and the meaning of the rather "cryptic" discussion about pension bridging. (*See* Crowley Rule 56(f) Certif. ¶ 10.) Viewed in the light most favorable to plaintiffs, the information contained therein could be interpreted such that it appears that the author was not only cognizant of the effect of a longer term post-closing net, but that such a result would be desirable because it would ensure that the new Paradyne's employees would have a reduced incentive to attempt to leave the new Paradyne right away. Such evidence, if admissible, would clearly be relevant to plaintiffs' § 510 claim. While we will not entertain plaintiffs' discovery requests in the context of these dispositive motions, we advise that plaintiffs may make an application before Magistrate Judge Wolfson for additional discovery, such as to ascertain the author and meaning of the notes.

We next turn to defendants' articulation of a legitimate non-discriminatory reason for the 8 month time frame. Clearly, defendants have articulated a legitimate non-discriminatory reason for the adoption and implementation of the no-hire agreements at issue in this case. Defendants maintain that the hiring freeze was an essential component of the sale because it would preserve Paradyne's employee base and thus ensure a smooth transition of ownership. Thus, as is often the case in evaluating employment discrimination claims, the controlling issue is whether defendants' reasons are a pretext for illegal discrimination.

The Court has reviewed the evidence submitted in connection with the instant motions. Viewing that evidence in the light most favorable to the non-moving party as we must, *see Aman v. Cort Rental Furniture Corp.*, 85 F.3d 1074, 1087 (3d Cir. 1996), we conclude that there is sufficient circumstantial evidence to demonstrate the existence of a genuine issue of material fact concerning defendants' intent in adopting and implementing the post-closing net. In this case, the relevant issue is defendants' motivation in adopting the post-closing net and implementing it for the time period in which it was effective, as plaintiffs lost their immediate bridging rights under the AT&T pension plan because the post-closing net barred even an attempt to seek reemployment with AT&T or Lucent for two months longer than the bridging rights extended. Here, the circumstantial evidence which we find relevant pertains to the economic advantages that AT&T and Lucent each gained as a result of adopting the post-closing net and implementing it for the length of time that it was in place. *See Ferret v. First Union Corp.*, No. 97-6759, 1999 WL 80374 (E.D. Pa. Jan. 25, 1999) (looking to evidence of former employer's positive economic consequences under similar factual circumstances and denying defendant's motion for summary judgment on plaintiffs' § 510 claim).

It is undisputed that as a general matter, the sale of Paradyne and its workforce from Lucent to TPG resulted in financial gain for AT&T and Lucent. Prior to its sale, the evidence demonstrates that Paradyne was not performing well economically. (*See* Arnold Aff. ¶ 5.) Thus the sellers of Paradyne had a great incentive to structure a sale in the most favorable way possible so as to ensure a smooth transition. *Id.* Against this backdrop is the fact, admittedly recognized by defendants, that the only way to ensure an effective transfer of ownership was to guarantee preservation of Paradyne's employee base. (Arnold Aff. ¶ 14.) This aspect of the transaction was of paramount importance in negotiating the sale. (*Id.* ¶¶ 13-14.)

Mr. Arnold advises in his affidavit that in determining the length of any post-closing net, AT&T and Lucent considered the amount of time likely to be needed for TPG to prove its capabilities to Paradyne employees, the amount of time to ensure continued quality service of Paradyne's existing customers, and the amount of time to position Paradyne to acquire new customers. (*Id.* ¶ 16.) After negotiations with TPG, all parties agreed to the 245-day time period to achieve that goal. (*Id.*) Conspicuously absent, however, is any further explanation as to why 8 months would be the optimum time-period for achieving defendants' goal in that regard. Coincidentally, the timing of the transaction was such that 8 months would ensure that former

AT&T/Lucent employees would lose their bridging rights after six months of separation from service from the seller, unless they worked for five additional years upon reemployment. Thus the practical effect of the 8 month time period was that former AT&T and Lucent employees would have less incentive to leave Paradyne at the end of the 245 day post-closing net and attempt to gain reemployment with AT&T and/or Lucent. The circumstances created that disincentive, which appears to be logically related to defendants' overall goal in effectuating the sale of the assets of Paradyne.

Viewing these circumstances in the light most favorable to plaintiffs, a finder of fact could conclude that defendants implemented an 8 month no-hiring plan with the specific intent to interfere with plaintiffs' potential pension bridging rights as a means to achieve the shared goal of consummating the sale and realizing a profit from the deal. *See Turner v. Schering-Plough Corp.*, 901 F.2d 335, 347 (3d Cir. 1990) (under § 510, plaintiff must demonstrate circumstances that provide some basis for believing that the prohibited intent to interfere with the employee's attainment of pension eligibility was present). As the Third Circuit in *Gavalik* explained: "[Section] 510 of ERISA requires no more than proof that the desire to defeat pension eligibility is 'a determinative factor' in the challenged conduct. 812 F.2d at 860. In our view, plaintiffs could prevail at trial if the evidence demonstrates by a preponderance of the evidence that plaintiffs' pension bridging rights were "a determinative factor" in defendants' decision to adopt and implement the 245-day post-closing net in its existing form. *Id.* Our understanding of the purposes underlying § 510 would indicate that such conduct would fall squarely within the purview of employer conduct prohibited by § 510. *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1543 (3d Cir. 1996) (noting that suits for discrimination under § 510 of ERISA are limited to actions affecting employer-employee relationship, not mere changes in level of benefits).

We note in this connection that we have considered several cases which stand for the proposition that the sale of an ongoing business is not prohibited by § 510, even where the sale results in the loss of benefits to employees. *See Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986); *see also Blaw Knox Retirement Income Plan v. White Consol. Indus. Inc.*, 998 F.2d 1185, 1990 (3d Cir. 1993) (hereinafter "*In re Blaw Knox*"); *Coates v. Kraft Foods, Inc.*, 12 F. Supp. 2d 862 (N.D. Ind. 1998). The most significant of the cases we have considered is the Third Circuit's opinion in *In re Blaw Knox*, 998 F.2d at 1190. However, our reading of that case indicates that its ruling does not govern plaintiffs' § 510 claim.

The *In re Blaw Knox* case arose from defendant White Consolidated Industries's ("WCI") sale and transfer of a group of their less profitable divisions ("BK Divisions") and their nine associated underfunded pension plans to the Blaw Knox Corporation ("BKC") in September 1985. Employees of the BK Divisions were participants in and earned pension benefits under the plans. WCI remained contractually obligated to make substantial contributions to the plans for five additional years. More than six years after the stated closing date of this sale, the largest of these pension plans terminated. Plaintiffs, the Blaw Knox Pension Plans and their fiduciaries ("the Plans"), brought suit against WCI, alleging that one of WCI's principal purposes in selling the BK Divisions was to avoid WCI's liability for the plans' unfunded benefits. Through the sale, WCI shifted that liability to BKC.

The Plans contended that the pension rights of the plans' participants and beneficiaries were adversely affected as a result of the sale. The Plans brought a claim pursuant to § 510, arguing that the sale of the BK division and the transfer of assets amounted to a termination of the employees' employment with WCI and interfered with the participants' attaining their pension rights. The district court dismissed the § 510 claim pursuant to Rule 12(b)(6). On appeal, the Third Circuit affirmed the dismissal.

The court of appeals explained that WCI's sale and transfer of the BK Division under the circumstances of that case did not amount to a § 510 violation because the substance of the transaction did not affect the participants' eligibility for benefits under the plans. In other words, the sale and transfer of the business, which was the employer conduct at issue, did not alter plaintiffs' rights under the plan at the time of the sale. The structure of the sale transaction between WCI and BKC was such that BKC, as the successor employer, took over the sponsorship responsibility after the sale. The court recognized that "although there was a change in employers, the employees who were participants in the plans prior to the sale continued their participation immediately after the sale. It was only the plans' sponsorship that was altered while the participants' rights under the plans remained unchanged." 998 F.2d at 1190.

We conclude that *In re Blaw Knox* does not control the outcome of plaintiffs' § 510 claim. First, *In re Blaw Knox* is distinguishable on its facts because the court's central holding was premised upon the fact that the participants' rights under the plan did not change with the sale and transfer of the business. Here, however, the gravamen of the plaintiffs' ERISA claim is that the post-closing net designed as part of the sale of the business caused a loss of certain employees' rights under the AT&T plan. More specifically, plaintiffs lost their immediate right to bridge their prior AT&T/Lucent employment upon reemployment with either company because of the length of time of the no-hire agreement.

We also note that certain passages of *In re Blaw Knox* support our conclusion. For example, the court recognized the general principle that the anti-discrimination language of § 510 is aimed at protecting individual rights rather than the financial integrity or security of the pension funds. Plaintiffs here are concerned with their individual bridging rights under the AT&T plan, and how the sale and associated post-closing net altered both their employment relationship with AT&T/Lucent and their rights under the AT&T pension plan. Thus, in our view, the general proposition that a sale of an ongoing business is not prohibited by § 510, which was recognized and applied in *In re Blaw Knox*, 998 F.2d at 1191, does not govern our analysis of plaintiffs' claims. Accordingly, defendants' motion for summary judgment on plaintiffs' § 510 claim is denied.[21]

---

[21] This claim will not be determined by a jury. There is no right to a jury trial for a claim under Section 510 of ERISA. *Cox v. Keystone Carbon Co.*, 894 F.2d 647, 649 (3d Cir. 1990); *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 394 (3d Cir. 1988); *Turner v. CF & I Steel Corp.*, 770 F.2d 43, 46-47 (3d Cir. 1985).

B. Daley Plaintiffs' § 510 Claim Premised upon Denial of Right to Participate in Job Replacement Program

Plaintiffs allege in the Daley Complaint that "[t]he denial and exclusion of the Class members from participation in the program established as aforesaid for assisting dislocated employees in obtaining replacement jobs with the AT&T, Lucent and NCR organizations, and for granting such dislocated employees preferential treatment, likewise represents interference with the attainment of ERISA-protected severance benefits and likewise violates ERISA Section 510." (Daley Compl. ¶ 59.) Defendants argue that dismissal of this claim is appropriate for two reasons: (1) plaintiffs cannot demonstrate that the "job replacement program" was an "employee welfare benefit plan" governed by ERISA, and (2) plaintiffs do not have standing to challenge AT&T and Lucent's decision to exclude those employees from the "job replacement plan."

We note initially that it appears that plaintiffs have abandoned this claim. (Crowley Rule 56(f) Certif. ¶ 9 (noting that principal point at issue in ERISA claim is whether the "job boycott" was planned and directed with full awareness that it would defeat plaintiffs' [s]o-called bridging rights").) Nevertheless, assuming *arguendo* that this claim is still before the Court, it must be dismissed because there is no evidence which demonstrates that the job replacement program is an "employee welfare benefit plan" covered by ERISA. *See* 29 U.S.C. § 1002(1); *see also Sherrod v. General Motors Corp.*, 33 F.3d 636, 638 (6th Cir. 1994); *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530, 1538-39 (3d Cir. 1992) (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (discussing factors for consideration in determining whether certain severance benefits offered by an employer implicate ERISA)). Accordingly, we will dismiss this aspect of plaintiff's § 510 claim against AT&T and Lucent at this juncture.

CONCLUSION

We have determined that AT&T, Lucent and TPG are entitled to summary judgment on plaintiffs' claim premised upon Section 1 of the Sherman Antitrust Act. Accordingly that claim will be dismissed against all defendants. However, as to plaintiffs' claim against AT&T and Lucent premised upon the adoption and implementation of the post-closing net under § 510 of ERISA, AT&T and Lucent's motion for summary judgment will be denied. To the extent that the Daley plaintiffs' Complaint alleged a violation the no-hire agreements could not participate in the AT&T job replacement program, that claim will be dismissed with prejudice.

IT IS THEREFORE on this 26th day of March, 1999 **ORDERED** that defendant AT&T and Lucent's motion for summary judgment (no. 32-1 an the docket) be and hereby is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) **GRANTED** as to plaintiffs' Sherman Act § 1 claim in its entirety and plaintiffs' ERISA § 510 claim premised upon plaintiffs' inability to participate in AT&T's job replacement program, those claims being **DISMISSED WITH PREJUDICE**; and

(2) **DENIED** as to plaintiffs' ERISA § 510 claim premised upon the post-closing net in place from July 31, 1996 to April 3, 1997; and

IT IS FURTHER ORDERED that defendant Texas Pacific Group's motion for summary judgment (no. 27 on the docket) be and hereby is **GRANTED** and plaintiffs' Complaints against said defendant be and hereby are **DISMISSED WITH PREJUDICE**; and

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment (no. 36 on the docket) be and hereby is **DISMISSED AS MOOT**.

s/ Mary L. Cooper
MARY L. COOPER
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 24, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5791

KURT H. EICHORN; WILLIAM J. HUCKINS; T. ROGER KIANG; EDWARD W. LANDIS; ORLANDO NAPOLITANO, individually and on behalf of all others similarly situated; GILBERT G. DALEY; SUSAN H. DIBONA; BETH KING; MICHAEL S. ORATOWSKI; THOMAS L. SALISBURY; LAWRENCE WALSH, individually and on behalf of all others similarly situated,

Appellants

v.

AT&T CORP; LUCENT TECHNOLOGIES, INC.; TEXAS PACIFIC GROUP

(D.C. Civ. Nos. 96-cv-03587 & 96-cv-04674)

SUR PETITION FOR REHEARING

Present: MANSMANN, SCIRICA, ALITO, ROTH, AMBRO and FUENTES, *Circuit Judges*, and POLLAK*, *District Judge*

---

* The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, who sat by designation, as to panel rehearing only.

Appendix D

The petition for rehearing filed by appellants and the petition for rehearing filed by appellees AT&T Corp. and Lucent Technologies, Inc. in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court en banc, are denied.

BY THE COURT,

s/ [illegible]
Circuit Judge

Dated: MAY 24 2001